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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 558

JAMES M. PENNINGTON, ET AL,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. .....

JAMES M. PENNINGTON,
RALPH E. PHILLIPS and
LILLIAN GOAD PHILLIPS,
Administratrix of the Estate
of Burse Phillips, deceased,
t/a Phillips Brothers Coal Company
HARRY P. STANSBERRY, individually
and t/a Stansberry Coal Company,
JESSE C. FESLER and
NOLA FESLER, individually
and t/a Fesler Coal Company
U. R. ARNOLD and
MRS. U. R. ARNOLD, individually
and t/a Arnold Mining Company, and
ARNOLD COAL COMPANY, INC.,
TENNCO, INC.,
E. C. McPHERSON, individually
and t/a McPherson Coal Company,
DEAN COAL COMPANY, and
W. R. PARTON, d/b/a
W. R. PARTON COAL COMPANY,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, James M. Pennington, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered September 11, 1968, in Case Nos. 17,445, 17,446, 17,447, 17,448, 17,449, 17,450, 17,451 styled as in the opinion of said Court copied in Appendix A hereinafter, wherein the Sixth Circuit affirmed judgments of the United States District Court for the Eastern District of Tennessee, Northern Division, entered August 1, 1966, against petitioners dismissing their claims against respondent, United Mine Workers of America (herein called "UMW" or "the union"), after a trial without a jury.

An agreed and certified record, consisting of the joint appendix filed in the Court of Appeals and the proceedings in the Court of Appeals, is furnished herewith, in accordance with Rule 21 of this Court.

OPINION BELOW

The Sixth Circuit's opinion appears in Appendix A hereto, pages 1 - 28. It is contained in the certified record, but is not yet printed in official reports. The opinion of the District Court is reported in 257 F. Supp. 815 and is contained in the certified record (138a-253a).

JURISDICTIONAL GROUNDS

This Court's jurisdiction is invoked under 28 USC, Sections 1254(1) and 2101(c). The judgment of the Court of Appeals was dated and entered September 11, 1968.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The claims of petitioners against UMW are founded on the Sherman Act, and jurisdiction of the District Court was invoked under 15 USCA 15.

QUESTIONS PRESENTED

1. Did the lower courts comply with the mandate of this Court after the first appeal, the lower courts having rejected the most crucial language of the controlling opinions of this Court as being inconsistent with certain general and preliminary statements made in those opinions?

2. Did the union by the clear terms of the "Protective Wage Clause" of the 1958 amendment to the National Bituminous Coal Wage Agreement, only a small part of which was before this Court on the first appeal, submit to such restraints upon its bargaining freedom in the various units of the industry as to violate the Sherman Act, those restraints having been demanded by the major companies with whom the union made the national contracts, and the union, the officers and representatives of all union branches, and smaller companies, being subject to trial by industry tribunals for violations of the restrictive covenants in any of the bargaining units?

3. Is a Sherman Act case to fail because of insufficient proof of the specific intent "to drive small competitors out of business" when it is undisputed that there was the intent to impose terms set by the conspirators on competitors, which terms were manifestly unjustified, unreasonable and concededly impossible to observe for over half the industry?

4. Is a Sherman Act case, based on a national contracting combination of union and business groups, to fail because of the proof of specific intent being held insufficient to satisfy Norris-LaGuardia's "clear proof" rule when there can be no question of authorization, ratification and participation in the industry-wide bargaining?

5. Was the District Court (sustained by the Court of Appeals) right in holding that effects of industry-wide bargaining are alone insufficient, and were both lower courts right in not considering anywhere in their findings and conclusions such effects—the growing prosperity of the two largest companies and the deficit position of all the rest of the industry combined, the inevitable and accelerating merger and concentration trend, the blight created in broad areas where conditions make the contract impossible, the loss of jobs of two-thirds of union members from automation made necessary by national contracts with nothing in the contracts to relieve the unemployed, the intensive and often violent efforts of the union to destroy the businesses of non-conforming operators, the waste of vital natural resources in abandonment of all but those areas of mines which can be stripped off the easiest or worked underground with large machines?

STATUTES INVOLVED

The statutory provisions involved are quoted in Appendix B herein and include Sections 1 and 2 of the Sherman Act (15 USCA 1, 2); Sections 4 and 6 of the Clayton Act (15 USCA 15, 17); Section 20 of the Clayton Act (29 USCA 52); Sections 2, 4 and 6 of the Norris-LaGuardia Act (29 USCA 102, 104 and 106); the Labor-Management Relations Act (29 USCA § 141, 151, 157, 158); and the National Employment Act (15 USCA 1021).

STATEMENT OF THE CASE

A. The History of the Litigation

In 1958 seven coal companies in northern Tennessee were sued by the Trustees of United Mine Workers of America Welfare and Retirement Fund to recover money judgments for delinquent royalties as signatories to the National Bituminous Coal Wage Agreement of 1950, as amended. These coal companies filed cross claims against United Mine Workers of America, and an eighth coal company, Dean Coal Company, filed an original action against UMW under the Sherman Antitrust Act, Sections 1 and 2 (15 USC, § 1, 2), alleging that commencing in 1950 UMW engaged in an agreement, combination or conspiracy with major coal companies "to stabilize the prices of coal, to restrain the trade of small coal producers, and to monopolize the bituminous coal industry for the major coal producers," (100a) alleging that the conspiracy called for the imposition of the National Bituminous Coal Wage Agreement of 1950, as it was negotiated and amended from time to time by UMW and the major companies, upon smaller companies such as the petitioners, even though it was obviously impractical and impossible for those companies to observe.

The first of these cases, James M. Pennington, et al., doing business as Phillips Brothers Coal Company, went to trial before a jury in the year 1961. After a verdict in favor of the coal company against the union, the verdict was sustained on the evidence by the Trial Court and the Court of Appeals for the Sixth Circuit (325 F.2d 804). This Court granted certiorari and in June of 1965 this Court reversed the judgment in favor of the coal company and *remanded the case for another trial consistent with the opinion of Mr. Justice White* (381 U.S. 657, 672).

In that opinion (joined in by the Chief Justice and Mr. Justice Brennan) this Court said, among other things:

> "From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, ***without regard to predatory intention or effect in the particular case***. For the salient characteristic of such agreement is that the union surrenders its freedom of action with respect to its bargaining policies .... It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policies." (italics ours)

This opinion was supposed to govern the second trial on the remand (381 U.S. 672).

In a concurring opinion, joined in by Justices Black and Clark, Mr. Justice Douglas held that there is a prima facie evidence of a violation of the Sherman Act in proof of an industry-wide agreement the necessary consequence of which, if carried out, is restraint of interstate commerce (381 U.S. 673).

On the remand, the case of James M. Pennington, et al., and the other cases mentioned above were consolidated for trial by an agreed order, petitioners agreeing that the trial would be without a jury. After the trial District Judge Robert L. Taylor filed a memorandum opinion, reported as Lewis v. Pennington, 257 F. Supp. 815, and found in the record (138a-253a). The Trial Judge held in favor of UMW and entered a Final Judgment on August 1, 1966, ordering the dismissal of the claims against the union in all of these cases, except the two

cases of Dean Coal Company and Parton Coal Company wherein there were alternative common law claims for violence, and judgments were entered against the union on the common law claims in those two cases. (These common law judgments were reversed and sent back for further consideration by the Court of Appeals, and no further mention need be made in this petition concerning those claims.)

With respect to the claims of the Trustees of the Welfare Fund against the seven coal companies, and going back to the first trial of the Pennington case, the jury in that trial returned a verdict against the Trustees holding that they were co-conspirators in the alleged Sherman Act conspiracy. On post-trial motions the Trial Judge set aside that verdict and entered judgment against James M. Pennington, et al., for the amount of the unpaid Welfare Fund royalties. James M. Pennington, et al., appealed that judgment to the Court of Appeals but the Court of Appeals sustained the judgment in favor of the Trustees (325 F.2d 804) and this Court denied Writ of Certiorari (381 U.S. 949). Subsequently, judgments have been entered in favor of the Trustees against these seven companies, or individuals doing business as coal companies, ranging in amount from that against Harry P. Stansberry of $23,347.00 to that against Tennco, Inc. of $169,877.00. Accordingly, the claims of the Trustees are now at rest.

The claims before the Court on this petition are the antitrust claims, all being in the appeal numbered 17,445 in the Court of Appeals. All the other cases, numbered 17,446 through 17,451, involve appeals by the union from the decision of the District Judge to tax costs against the union. The Court of Appeals reversed this decision, and it is the position of petitioners that the decision on these costs appeals should abide the decision on the antitrust claims.

B. The Opinion of the District Court

In deciding the second Pennington case, and in contrast to the above quoted language of Mr. Justice White's controlling opinion and Mr. Justice Douglas' concurring opinion in the first Pennington case, the Trial Court said:

> "Upon careful consideration, the Court has reached the conclusion that the Pennington case teaches that it ***is necessary to find predatory intent to drive small coal operators out of business*** in order to hold the employer and union for a violation of the Sherman Act .... The standard of proof necessary to show predatory intent is governed by the recent decision of the Supreme Court in United Mine Workers of America v. Paul Gibbs (483 U.S. 715)." (167a) (257 F. Supp. 829) (italics ours)

In rejecting the crucial language of Mr. Justice White's opinion, the District Judge said:

> "Justice White's Footnote No. 2 indicates that the antitrust law is not designed to protect marginal operators; that ill effects alone on the marginal operators is not enough to show intent." (167a) (257 F. Supp. 829).

The Court never considered in its opinion the drastic effects throughout the whole industry and areas devoted to coal mining of the practice complained of in this case.

With respect to Mr. Justice Douglas' opinion, the Trial Court indicated that he considered the second paragraph of that opinion inconsistent and contradictory of the first paragraph, and the Trial Court said:

> "It is to be observed that Mr. Justice Douglas under Paragraph 1 stated that if the agreement contained the

two factors mentioned in that paragraph, namely, an industry-wide agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that it was made for the purpose of forcing some employers out of business, both the employer and the union to the agreement would be guilty of violating antitrust law. Yet, in the second sentence, he says that such industry-wide agreement containing those features is only prima facie evidence of a violation of the antitrust laws." (166a) (257 F. Supp. 828).

The Trial Court goes on to dismiss the second paragraph of the concurring opinion of Mr. Justice Douglas as meaningless.

Thus the Trial Court reached the conclusion that predatory intent to drive small coal companies out of business was the essential matter that must be proven, and, further, the Trial Court held that this type of intent must be proved with such certainty as would satisfy the Norris-LaGuardia Sec. 6 "clear proof" rule. Direct evidence was the only thing that would satisfy. Effects and consequences of the course of conduct of the alleged conspirators was not considered material and was not taken into consideration in the reaching of the Court's conclusion that there was not the clarity of proof necessary to establish the required predatory intent.

Laying aside the lengthy verbatim quotations by the opinion of the Trial Court from the statement of theories and oral arguments of each side, and laying aside the long quotations from the arguments of each side about a matter which was a major issue in the first trial but was only a small corner of plaintiff's second case (predatory or discriminatory pricing by union owned companies on the

market supplied by petitioners), and looking at the findings and conclusions of the Court on the central and important issues concerning industry-wide bargaining which was the all important issue in the second trial, ***there is no discussion of this except in two places***. At 231a (257 F. Supp. 859) a short paragraph is given to bargaining that took place in 1950, before the formation of the dominant coal association, Bituminous Coal Operators Association. Then the opinion skips to the 1958 Protective Wage Clause (quoting it in a marginal note but leaving out the important introductory paragraph), considering only a small part of that clause. The clause reads in this part:

> "During the period of this contract, the United Mine workers of America will not enter into, be a party to, nor will it permit any agreement or understanding ***covering any wages, hours or other conditions of work applicable to employees covered by this contract*** on any basis other than those specified in this contract ..." (231a) (257 F. Supp. 859).

The Trial Court refers to this part of the clause as reading:

> "Paragraph A obligates the UMW not to enter into or be a party to any agreement covering wages and working conditions applicable to ***employers covered by the contract*** on any basis other than those specified in the contract." (235a) (257 F. Supp. 862).

We have been completely unsuccessful, after lengthy urging in briefs, to get the lower courts to consider this Protective Wage Clause (including its introductory paragraph) as a whole, or consider who made it and under what circumstances, and the history of bargaining over a period of eight years by two man bargaining teams, and how this clause fitted into that history and into the national

contracts already existing, and the practical construction given, and the potential impact of such a clause as this on an industry the great bulk of which was marginal as proved by the union's own lawyers (1670a-1671a).

The Trial Court gave no other consideration to the proof about industry-wide bargaining than that indicated above. It did not mention any of the direct proof as to motivating intentions (if organizations like unincorporated unions and coal associations can have specific "intentions") such as that found at 1784a-5a, 789a-792a, 812a, 816a-7a.

As to circumstantial proof of intention from effects of the course of conduct of those who made the national contracts, the Trial Court had rejected this approach as stated above.

It was in this frame of reference that the Trial Court was able to say that it did not find "predatory intent to drive small mine operators out of business" with proof clear enough to satisfy Norris-LaGuardia's "clear proof" rule. How the Norris-LaGuardia rule became significant is not clear, itself, because when you are talking about national bargaining over the period of a decade you are talking about acts which are obviously authorized, particularly when the union's proof and briefs go into detail showing how all the steps taken on these national contracts were duly approved by scale committees and conventions.

C. The Opinion of the Court of Appeals

With all of this the Court of Appeals agreed. That Court felt that the Trial Court's opinion was "exhaustive" and it is clear no new considerations were added from the record.

The Court of Appeals is not as explicit as the Trial Court in dealing with the prior opinions of this Court.

The Court of Appeals simply ignores the paragraph "second" of Mr. Justice Douglas' opinion and does not mention proof of effects and consequences of the conduct of those who made the national contracts.

The Court of Appeals does say that the opinion of Mr. Justice White was not supported by a majority of the Court, but fails to point out that on the remand the second trial was supposed to be consistent with that opinion (381 U.S. 672).

The Court of Appeals agrees with the District Judge that "intention of driving competitors out of business" is the essential ingredient and that this must be established by "clear proof." But the Court fails to point out how that "clear proof" rule can be a significant question in this case which concerns national bargaining over the period of a decade by an international union, whose participation in the bargaining and in the effects and consequences to the industry and to the country are beyond question.

STATEMENT OF FACTS

The "National Bituminous Coal Wage Agreement of 1950" as amended in 1951, 1952, 1955, 1956, 1958, is truly an industry-wide agreement and is unique in this respect. (2232a-2341a, 1670a, 816a, 1330a-1331a).

There is no authority in any district or local representative of UMW to permit or to make any change in the national contract negotiated in Washington by the international union. (689a-690a).

Since 1950 the terms of the industry-wide contracts have been fixed in negotiations between UMW and Bituminous Coal Operators Association (BCOA), a bargaining

unit that represented only a part of the industry (720a, - 721a, 1768a, 782a-787a, 792a-793a, 2136a). These amendments to the national contract steeply increased the labor costs in the coal industry (793a).

While the largest coal producers are able to make very substantial profits, the balance of the industry cannot absorb the extravagant costs of the national contract; the result is that the industry is being taken over by a few large combines of producers. The fact that the bulk of the industry loses money and that the industry as a whole is marginal is acknowledged by opposing counsel (1670a-1671a). The principal witness for the union from the industry, Mr. George Love, who headed the largest company, acknowledged that his company and the other of the two largest companies made combined profits in the range of $43,000,000 annually after satisfying the requirements of the national contracts, while the rest of the industry all put together suffers annual losses in the range of $12,500,000, after paying upwards of $105,000,000 simply as welfare fringe benefits annually under the national contract (1790a-1794a).

The welfare fringe benefits imposed by the national contracts is enormously greater than that in any other industry, but the resulting unemployed get no benefits (1250a, 1222a-1223a).

Since 1950, great combines are being formed in the coal industry and these combines are able to make savings which enable them to operate profitably (809a, 945a, 1789a, 1867a-1868a).

The national wage contracts since 1950 were tailored to fit the new technology of intensive mechanization in mining, which the major combines, favored by geology and better mining conditions as well as by financial

strength, have been able to attain far better than the smaller production units (806a-807a, 1774a, 949a-951a, 952a, 948a-949a, 1041a). Two-thirds of the men have been forced out of the industry in the period of 1950-1959 (1451a, 2287a).

The economic plight of many coal-producing areas is well known. It has received priority attention from Congress and the President. The blighted coal towns suffer severe hardships, even actual starvation. The men in these blighted areas face these hardships waiting hopefully for jobs in the mines. Eventually, those who can, move away in search of new employment in other areas. The loss of these men to the coal industry is a critical one. It takes years to train a modern coal miner. This loss constitutes a weakening of a basic industry that is essential for the economic strength of the country (1797a-1798a).

Special studies have been made by the State of Tennessee with respect to the problem of unemployment in the coal fields of Tennessee. This has been a constantly growing problem since 1950 (1108a-1111a).

The Trial Court found that the small producers in the Tennessee field, including these petitioners, were not able to comply with the National Bituminous Coal Wage Agreement (167a).

But this experience of these petitioners in the Tennessee coalfields were not limited to these companies alone. The Trial Court has found facts which indicate the difficulty of operating in the Tennessee fields under the national contract (176a, 195a, 206a). At the southern end of the state, the entire Southern Tennessee field had been on strike for four years at the time of the trial of this case, because the operators could not, or would not, sign

the National Bituminous Coal Wage Agreement (1530a, 1897a-1899a).

With respect to companies beside these petitioners situated in the upper East Tennessee fields, the most modern underground producer in the state could not operate profitably under the national contract (1137a-1145a, 2244a-2250a), and the most efficient surface mining operator could not comply with the national contract, attempting to use the larger type stripping equipment (333a, 363a-365a, 369a-371a).

The organized industry of Tennessee (meaning those larger companies or mines which were represented by one of the larger operator associations that previously dealt with UMW in signing national contracts), has completely disintegrated since 1950. The larger East Tennessee mines were represented by Southern Appalachian Coal Association which was a member of Southern Coal Producers Association. None of the petitioners belonged to those associations. Those companies and mines which had belonged to the organized associations have gone out of existence except the two mines owned and operated in Tennessee in the period of this case by major producers, Consolidation Coal Company and the Pittston Company (1117a-1118a, 1886a-1894a, 1113a-1118a).

As demonstrated by witnesses on both sides, what is left in Tennessee is a number of small companies, usually operated by members of a family, whose company names constantly change and these mines are giving employment to previously unemployed coal miners of the region (1107a, 1533a, 1933a-1934a). The numbers of these smaller mines have actually increased as the larger mines, employing relatively large numbers of men, passed out of existence and the employees of these larger mines went

over to the smaller mines to obtain employment (1092a, 2057a-2058a).

UMW not only knows of the plight of the large number of smaller companies that struggle for survival through UMW's organizing drives, but since 1950 UMW has taken the attitude that the industry would be better off without them —"they are just a drag on the industry" (812a).

Bituminous Coal Operators Association (BCOA), the unit which negotiated these national contracts, was organized by Mr. George Love in 1950. Mr. Love was the head of the largest coal company, Consolidation Coal Company, and he obtained Mr. Moses to head up BCOA (1769a-1770a, 777a, 720a-721a). Mr. Love had an object of avoiding having his competitors pay a lower wage cost than his company paid (1784a). And this was true although he recognized that the natural conditions of the various fields were different with respect to the ability to attain a high productivity (1784a-1785a).

Subsequently, in 1955, the head of BCOA, Mr. Moses, made a statement, which was *quoted in the official journal of UMW*, concerning the relationship of BCOA to the union and the purposes of BCOA. He stated that BCOA was established to attain economic stability in the industry and had made it possible for two men to sit down and bargain for national contracts and had made possible "swift and effective handling of national problems on an authoritative bases." He stated that "perfect stability is an attainable goal and that the coal industry has taken long steps in that direction" (789a-792a).

THE PROTECTIVE WAGE CLAUSE

The Protective Wage Clause is set forth herein as Schedule A at the end of this petition. It is also found at 794a-799a and at 2242a et seq.

In 1958 the demand for coal declined sharply and the average price dropped from its highest amount of $5.08 in 1957 to $4.86 in 1958 (2287a).

In negotiations with BCOA for the 1958 national contract amendment, UMW sought to tighten up the contract provisions boycotting non-complying producers as previously contained in the so-called Land-Lease Clause of the 1952 amendment. On the other hand, according to UMW's theory and the evidence, coal company representatives were complaining to UMW about there being a lack of enforcement or application of the contract to some production (121a, 1403a).

UMW Counsel characterized the resulting Protective Wage Clause of the 1958 Amendment as a "quid pro quo" (2143a, 2185a-2186a). The introductory paragraph of the clause reads:

> "The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows."

It is to be borne in mind that this provision amended the 1950 National Bituminous Coal Wage Agreement and

UMW and BCOA, in working up this clause in 1958, were fixing in writing the express duties of UMW with respect to the 1950 National contract.

UMW and BCOA exchanged drafts of the proposed Protective Wage Clause in November of 1958. UMW was demanding that BCOA agree to provisions which would require all signatories to refuse to buy or handle at all any non-complying tonnage. (This requirement became Paragraph B of the Clause.) In exchange for this enforcement of the operators' "duties" and in response to the demands of the negotiating operators, UMW was willing to express in the clause its "commitment" to see that the contract was observed by all. This is according to the testimony of Mr. Hopkins, Senior Counsel for UMW, who testified that Paragraph A of the Protective Wage Clause was the part demanded by the operators (2185a-2186a).

Thus, in exchange for the boycott agreed to by BCOA, contained in Paragraph B, UMW, in Paragraph A, agreed:

> "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto" (2242a).

Paragraph B of the Protective Wage Clause required signatory operators to boycott coal produced without compliance with the national contract (2242a).

Paragraphs C and E of the Protective Wage Clause established a "Joint Industry Contract Committee" and "Joint District Contract Committees" to act as tribunals composed of industry and union representatives to try UMW, its agents, or any operator for violations of the duties contained in the Protective Wage Clause (2242a-2243a).

Paragraph D required UMW to report and list to the Contract Committees the names of the operators "whose operations are under contract with the union." A signatory operator was not subject to trial for buying or dealing in coal produced by any operator on this list reported by the union unless that operator had previously been found not in compliance with the contract (2242a-2243a).

Paragraph E required UMW to make available to the Contract Committee "all contracts, agreements, or understandings entered into by the Mine Workers with any person engaged in the production of bituminous coal," and to make its appearance before the Committee on request in case of investigation of alleged violations of the Protective Wage Clause (2243a).

UMW and BCOA lawyers are presently engaged in defending this clause in an NLRB case based on violation of labor law. They appear to be having success. Antitrust law is not involved in that case. (See *Lewis v. NLRB*, 350 F.2d 801).

As the Trial Court found, it was the 1958 amendment, containing the Protective Wage Clause, that UMW was attempting to apply to the East Tennessee coal field in 1959, when a wave of violence broke out. The Tennessee operators balked at signing this contract and there resulted months of mine closures, dynamitings and shootings and several of our clients were heavily damaged (243a,

248a-249a, 296a, 342a, 374a-375a, 493a). The joint efforts of the Tennessee operators to negotiate a practical contract with the union met with demands to sign the national contract or nothing (375a-376a, 380a-381a).

REASONS FOR GRANTING THE WRIT

1. The lower court decisions reject the law of the case contained in this Court's prior opinions upon which the remand was based.

2. This is the case of first impression on the application of antitrust law to industry-wide bargaining; the lower courts have supplanted rules laid down by this Court on this question in this case with a different set of rules.

3. Industry-wide bargaining is a potent factor in our economic order; it has a natural tendency to favor the dominant units of an industry who negotiate the contracts over the smaller and weaker units who follow along behind; it tends toward concentration and oligopoly; practical and workable principles under antitrust law regulating industry-wide bargaining must be retained or competition will perish; the rules which the lower courts have substituted in this case are patently not workable.

4. Unchallenged and unchecked industry-wide bargaining has contributed more than any other factor to an inflationary wage-price spiral that threatens our free enterprise system; the Joint Economic Committee of Congress has repeatedly warned of this threat and has urged that all federal policies must concentrate and be focused upon the preservation of competition and the stopping of the merger tide; the rules laid down by the lower courts allow a large union and large employers to engage in practices that run in the directly opposite direction (See 1967 Joint Economic Report, Pages 25-26, 90th Congress, 1st Session, Senate Report No. 73).

5. Industry-wide bargaining goes beyond multi-employer bargaining, voluntarily arrived at; it forces impractical conditions on a large segment of the business community without giving a chance to speak or choose; fundamental national labor policy is well set in favor of bargaining unit by unit; antitrust policy is well set against any practice which unreasonably restrains trade; national employment policy set forth in the Employment Act (15 USC 1021) is centered upon preserving competition as the best way to further employment.

CONCLUSION

For the reasons assigned, petitioners pray that the writ of certiorari be granted to review the decision and the judgment of the United States Court of Appeals for the Sixth Circuit entered in cases No. 17,445 through 17,451, on September 11, 1968.

Respectfully submitted,

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SCHEDULE A

PROTECTIVE WAGE CLAUSE

The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:

A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under

terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

"Procured or acquired under a subcontract arrangement" means any contract, lease, license, agreement, arrangement or understanding pursuant to which the signatory operator acquires coal, either as principal or agent, directly or indirectly from a producer other than such signatory for delivery to a person other than such signatory.

The obligation assumed hereunder shall not affect any agreement in effect as of the date of execution of this contract: Provided, however, that any operator signatory hereto shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms.

The Operators signatory to this agreement shall so conduct their own operations (whether operated directly or indirectly, or through subsidiaries or affiliates) so as to fully comply with their obligations under this Clause. The obligation of each Operator signatory hereto, which is several and not joint, to fully perform all the conditions in this paragraph B contained,

shall be a direct and continuing obligation of said Operator during the life of this Agreement.

As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Clause covers the operation of all the coal lands, coal producing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The said Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities as a subterfuge for the purpose of avoiding the application of this Clause.

C. There is hereby established a Joint Industry Contract Committee composed of six (6) members, three (3) of whom shall be appointed and may be removed by the Union and three (3) of whom shall be appointed and may be removed by the Operators. Such appointments shall be made and notice thereof given to the proper parties hereto as expeditiously as possible and not later than thirty (30) days after the date of the execution of this Contract. In the event of resignation, removal, death, inability or unwillingness to serve of any of the members of the Committee, the Union shall appoint the successor or successors of the members originally appointed by them. Action which may be required of the Operators for the appointment of any member of the Joint Industry Contract Committee representing them may be taken by those Operators who, at the time, are signatories hereto. Authorization, approval or ratification of Operators representing fifty-one (51) per cent or more of the coal produced for

use or sale during the calendar year previous to that in which such action is taken shall be sufficient to bind all Operators.

The Joint Industry Contract Committee may appoint such Joint District Contract Committees in such districts or groups of districts as it may determine, such district committees to consist of such numbers of members, half of whom shall represent the Union and half of whom shall represent the Operators in that district or groups of districts, as the Industry Committee shall deem advisable. The Joint District Contract Committees shall assist the Joint Industry Contract Committee in making any investigations hereunder.

The Joint Industry Contract Committee and the Joint District Committees, when authorized by and under the supervision of the Industry Committee, may employ such clerical and other employees as are required for the performance of their duties hereunder. Expenses of all Committees shall be borne equally by the Union and the Operators.

D. Within one hundred and twenty days after the execution of this contract and each six months thereafter each Operator signatory hereto shall certify in writing to the Joint District Contract Committee for the District where he maintains his principal place of business where such a District Committee exists, or to the Joint Industry Contract Committee where no District Committee exists, that he is in full compliance with all the terms and conditions of this contract or any applicable District Agreement. Within one hundred and twenty days after the execution of this Agreement, and each six months thereafter each Union District

President shall certify in writing to his Joint District Contract Committee, if one exists, or, if none exists, to the Joint Industry Contract Committee, a complete list of all Operators and Mines engaged in the production of bituminous coal within his district whose operations are under contract with the Union. No operator may be found to be in violation of this Protective Wage Clause with respect to any coal produced by another operator who is listed on the Contract list to be furnished by United Mine Workers of America under this paragraph, unless and until such operator is notified in writing by the Joint Industry Contract Committee that such Operator has failed to comply with the provisions of this Clause and such failure has not been corrected.

E. Any party signatory to this contract shall have the right at any time to file a complaint with the Joint Industry Contract Committee alleging a violation of any provision of this Protective Wage Clause. In the event such a charge is filed it shall be the duty of the Joint Industry Contract Committee to investigate and determine the facts with respect to such alleged violation. Any determination by the Joint Industry Committee that a violation of this Clause has occurred may be made only upon the concurrence therein of a majority of the membership of the Committee. Notice by the Committee to the affected party, opportunity for the party to be heard, and failure promptly to effect full compliance after a finding of violation by the Committee shall be deemed a condition precedent to any final determination that a violation of this Clause has occurred. Findings made by the Joint Committee, after notice and opportunity for hearing, shall be served upon all parties to the proceeding, and shall constitute a final

determination as to the fact of a violation. Failure or refusal of United Mine Workers or any Operator signatory hereto to comply with a final determination by the Committee of a violation of Paragraphs (A) or (B) of this Clause may be deemed a violation of this Agreement.

The Mine Workers agree to make available to the Joint Industry Contract Committee all contracts, agreements, or understandings entered into by the Mine Workers with any person engaged in the production of bituminous coal, and further agree to appear before the Committee on request by it and inform the Committee on such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause. Each Operator signatory hereto agrees to appear before the Committee on request by it and inform the Committee as to the source and quantity of coal produced or purchased or otherwise acquired, payment of wages to, and hours and working conditions of classified employees, payments to the United Mine Workers of America Welfare and Retirement Fund, and such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause.

The authority of the Committee is restricted to the subject matter covered in this Protective Wage Clause and shall not extend to disputes concerning the administration of the Contract which are of the type that have heretofore been processed under the grievance procedures provided for in the Section of the Contract entitled "Settlement of Local and District Disputes"; nor shall the provisions of this "Protective Wage Clause" be subject to the terms or conditions of the "Settlement of Local and District Disputes" section of this Contract.

APPENDIX A

[1] In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 17,445

JOHN L. LEWIS, JOSEPHINE ROCHE and HENRY G. SCHMIDT, As Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs,

v.

JAMES M. PENNINGTON, ET AL.,
Defendants,
Cross Plaintiffs-Appellants,

v.

UNITED MINE WORKERS OF AMERICA,
Cross Defendant-Appellee.

No. 17,446

JOHN L. LEWIS, JOSEPHINE ROCHE and HENRY G. SCHMIDT, As Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs,

v.

JAMES M. PENNINGTON, ET AL.,
Defendants,
Cross Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division

[2] No. 17,447

JOHN L. LEWIS, JOSEPHINE ROCHE and HENRY G. SCHMIDT, As Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs,

v.

HARRY P. STANSBERRY, Individually and t/a Stansberry Coal Company,
Defendants,
Cross Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross Defendant-Appellant.

No. 17,448

JOHN L. LEWIS, JOSEPHINE ROCHE and HENRY G. SCHMIDT, As Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs,

v.

JESSE C. FESLER and NOLA FESLER, Individually and t/a Fesler Coal Company,
Defendants,
Cross Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross Defendant-Appellant.

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[3] No. 17,449

JOHN L. LEWIS, JOSEPHINE ROCHE and HENRY G. SCHMIDT, As Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs,

v.

U. R. ARNOLD and MRS. U. R. ARNOLD, Individually and t/a Arnold Strip Mining Company, a Partnership, and THE ARNOLD COAL COMPANY, INC.,
Defendants,
Cross Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross Defendant-Appellant.

No. 17,450

JOHN L. LEWIS, JOSEPHINE ROCHE and HENRY G. SCHMIDT, As Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs,

v.

TENNCO, INCORPORATED,
Defendant Cross Plaintiff-Appellee.

v.

UNITED MINE WORKERS OF AMERICA,
Cross Defendant-Appellant.

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[4] No. 17,451

JOHN L. LEWIS, JOSEPHINE ROCHE and HENRY G. SCHMIDT, As Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs,

v.

E. C. McPHERSON, Individually and t/a E. C. McPHERSON COAL COMPANY, M. W. NORQUEST and E. C. McPHERSON, Individually and t/a McPHERSON COAL COMPANY,
Defendants,
Cross Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross Defendant-Appellant.

No. 17,452

DEAN COAL COMPANY,
Plaintiff-Appellee,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

No. 17,453

W. R. PARTON d/b/a W. R. PARTON COAL COMPANY,
Plaintiff-Appellee,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

Decided September 11, 1968.

Before: EDWARDS, PECK and COMBS, Circuit Judges.

No. 17,445

PECK, Circuit Judge. The complicated factual pattern of this case and its protracted history in the courts are fully reported in an opinion in this Court on a previous appeal[1], in the opinion of the Supreme Court[2] reversing our earlier determination and remanding the cause, and with even greater precision and detail in the exhaustive opinion of Chief Judge Robert E. Taylor of the United States District Court for the Eastern District of Tennessee in his opinion following trial on the remand[3]. The case is again in this court on appeal from an order entered by the District Court following that remand. Because of the availability of full statements of the facts in those opinions they will be here presented in abbreviated form. This case and its companion cases were succinctly described by Judge Taylor in this manner:

> "These cases are the last chapter in a spate of litigation between coal operators in Scott, Anderson and Campbell Counties, Tennessee, and United Mine Workers of America . . . resulting from labor disputes that arose in 1955 and continued intermittently through 1959." (257 F. Supp. at 817.)

The original plaintiffs (not parties to this appeal), hereinafter referred to as "Trustees" (John L. Lewis, Henry G. Schmidt and Josephine Roche, Trustees of the United Mine Workers of America Welfare and Retirement Fund) brought this action against the cross-plaintiffs-appellants,

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1 325 F.2d 804 (1963).
2 381 U.S. 657 (1965).
3 257 F. Supp. 815 (1966)

hereinafter referred to as the "plaintiffs-appellants" or as "Phillips"; the individual plaintiffs-appellants are James M. Pennington, Raymond E. Phillips and Bruce Phillips[4], and they were named individually and as
[6] trading as Phillips Brothers Coal Company, a Partnership. Sought in the action was the sum of $55,982.62 allegedly due as royalty payments under a trust provision in a wage agreement entered into between the United Mine Workers of America (hereinafter "UMW" or the "Union") and Phillips. The agreement referred to is the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, hereinafter the "National Agreement." This agreement was executed by Phillips and UMW October 1, 1953, and reexecuted with amendments September 8, 1955, and October 22, 1956. Responsive to the complaint, Phillips filed an answer and a cross-claim against UMW praying for actual damages in the amount of $100,000 and for punitive damages, alleging that Trustees, the UMW and certain large coal operators had conspired to restrain and monopolize interstate commerce in violation of Sections 1 and 2 of the Sherman Antitrust Act, as amended, 26 Stat. 209, 15 U.S.C. §§ 1, 2 (1958 ed.).

In the answer it is alleged that Phillips entered into the National Agreement, the execution of which is not contested, by reason of duress in the form of a program of terrorism instigated by the UMW in the area of Phillips' mine. It is alleged that the agreement, and its amendments, were executed because otherwise Phillips would not have been permitted to operate their coal mine. It is the contention of the answer that for these reasons the

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[4] The administratrix of his estate was substituted as a party defendant after the death of Bruce Phillips.

contract is illegal and that no liability for royalties exists under it. However, it was held by this court that regardless of the factual contentions of the plaintiffs-appellants under these defenses, the Trustees were entitled to recover the royalties contracted for which were based on the tonnage mined during the period of time involved. 325 F.2d 804. Certiorari was denied (381 U.S. 949 (1965)), judgment was entered for the Trustees, and no issue in this regard is presented under the present appeal.

[7] In the cross-claim it is alleged that prior to the National Agreement questions concerning wages, the welfare fund and the UMW's efforts to control working hours had resulted in controversy, but that the National Agreement had resulted in relative peace. Overproduction of coal was alleged to be the critical problem of the industry and the elimination of the smaller operators and consequent placing of control of the market in the larger companies was stated to be the agreed solution. The cross-claim states that the UMW abandoned its efforts to control working hours, agreed not to oppose rapid mechanization of the mines, on the contrary to help finance such mechanization, and to impose the terms of the National Agreement on all operators. The UMW was allegedly to benefit from increased wages as mechanization increased productivity, but the smaller companies were to be required to pay the increased wages whether mechanized or not. Welfare fund payments were to be proportionately increased and other steps prohibiting the marketing, production and sale of nonunion coal were alleged to have been agreed to by the UMW and large companies. They obtained a minimum wage for employees of operators selling coal to the Tennessee Valley Authority under the provisions of the Walsh-Healey Act, as amended, 49 Stat. 2036, 41 U.S.C. § 35, et seq. Four of the larger com-

panies subsequently are claimed to have waged a destructive and collusive price-cutting campaign in the TVA coal market, in two of which the UMW is alleged to have held a sufficient interest to make control possible.

This Court affirmed the judgment against the UMW entered on the jury verdict holding that the UMW was not exempt from liability under the Sherman Act, found the trial judge's instructions to the jury adequate and held the evidence generally sufficient to support the verdict. 325 F.2d 804. Certiorari was granted (377 U.S. 929 (1964)),[5] and as previously noted the Supreme Court reversed [8] and remanded the cause. 381 U.S. 657. That decision of the Supreme Court will herein be referred to as "*Pennington*."

The principal issues in this action find their genesis in Sections 1 and 2 of the Sherman Antitrust Act. Section 1 prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . ." Only unreasonable or undue restraints fall within the proscription of this section, as determined by application of what the Supreme Court has referred to as "the rule of reason." *E.g.*, *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911). Under this standard, each restraint is evaluated in light of the particular facts of that case, considering the peculiarities of the industry, the conditions in the industry before and after the inception of the restraint, the nature of the restraint and its effect, the problem to which the restraint was directed, and the end or purpose sought by reason of

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[5] Petitioner in this proceeding was the UMW, and it is not to be confused with the proceeding hereinabove mentioned in which certiorari was denied (381 U.S. 949), wherein plaintiffs-appellants were the petitioners, and which concerned only the judgment in favor of Trustees on the royalties issue.

the restraint. The test is whether "the restraint is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918). Under the rule of reason some restraints such as price fixing and market allocation are conclusively presumed to be unreasonable and to constitute per se violations of the Act. See *e.g.*, *United States v. E. I. DuPont DeNemours & Co.*, 351 U.S. 377, 387 (1956).

Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . ." Of the three courses of conduct proscribed by this section, we are here concerned with only the third, that of combining or conspiring to monopolize trade. Unlike the substantive offense of monopolization, where it need be established that a company has monopoly power (power to fix prices and exclude competitors) coupled with a general or deliberate intent to exercise that power (*United States v. Griffith*, 334 U.S. 100 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946)) a specific intent to accomplish an unlawful result is necessary where monopoly power has not been obtained and the charge is an attempt or conspiracy to monopolize. See *American Tobacco Co. v. United States*, *supra*; *Swift & Co. v. United States*, 196 U.S. 375 (1905); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948). In the conspiracy cases, proof of this specific intent will as a practical matter often merge with proof of the conspiracy itself.

[9]

Cases involving labor unions present special problems in connection with the antitrust laws. The dissent in

Pennington reviews at length the difficulties had in harmonizing the two areas of law. One of the cases cited there was *Apex Hosiery v. Leader*, 310 U.S. 469 (1940), in which the Court held that the Sherman Act was aimed, not at restraints occasioned by union organizational strikes which interrupt interstate shipments of goods, but at restraints upon commercial competition in the marketing of goods. In *United States v. Hutcheson*, 312 U.S. 219 (1941) a union struck an employer who had given work to a competing union. This was held to be no violation of the Sherman Act since all union conduct specified in section 20 of the Clayton Act was, in light of the Norris-LaGuardia Act, immunized from the antitrust laws. "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom . . . of the end of which the particular union activities are the means." 312 U.S. at 232.

In *Allen Bradley v. Local Union No. 3*, 325 U.S. 797 (1945), the union was held liable under the Sherman Act. In that case, the union obtained closed shop agreements by strikes and boycotts under which electrical contractors were obligated to purchase equipment from none but local manufacturers; "manufacturers obligated themselves to confine their New York City (the pertinent market) sales to contractors employing" union members. Such agreements

[10] "expanded into industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control. Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and to bar from the area equip-

ment manufactured outside its boundaries. The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. . . . [T]he three groups, in combination as 'co-partners', achieved 'a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs.'" 325 U.S. at 799-800.

The Court concluded that the combination of businessmen violated the Sherman Act unless it was immunized by participation by the union. The issue framed was whether the union was liable under Sherman when, "to further their own interests as wage earners, they aid and abet business men to do the precise things which that Act prohibits?" *Id.* at 801.

The Court noted that the means used by the union such as strikes were not violative of the federal antitrust laws under section 20 of the Clayton Act. Yet the union combined with the contractors and manufacturers, who were violating the Act. The Court stated:

"[W]e think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Id.* at 808.

Absent the illegal combination of businessmen, the Court suggested that the union could have achieved the same results as the illegal monopoly by dealing (or coercing by means of economic sanctions such as strikes) each contractor and manufacturer on an individual basis:

"Employers and the union did here make bargaining agreements in which the employers agreed not
[11] to buy goods manufactured by companies which did not employ the members of [the union]. We

may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City. . . . So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act. . . . But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included with the exemptions. . .

* * * * *

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." *Id.* at 809, 810.

It has of course been established that the UMW dealt with a "combination" of business competitors in the form of a multi-employer bargaining unit in the present case.

As indicated above, a combination to restrain trade by fixing prices, regardless of the reasonableness of such price, is illegal per se. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 223 (1940). It is alleged in this case that two of the larger coal producers, West Kentucky Coal Company and the Nashville Coal Company, companies in which UMW had invested $25,000,000 of risk capital, submitted bids for the huge TVA coal account in a manner

calculated to depress the price on the TVA coal market, and thereby drive small operators out of business.

[12] The trial court specifically rejected this contention and found the proof insufficient to establish "that West Kentucky Coal Company or any other coal operator bid on TVA coal for the purpose of depressing the price of coal on the TVA coal market and thereby drive small operators, including plaintiffs, out of business . . . or that West Kentucky Coal Company or any other operator through arrangement, combination or otherwise fixed the price or attempted to fix the price of coal on the TVA market." 257 F. Supp. at 863. The court further found plaintiffs' proof to be insufficient to show that the "UMW, by arrangement, combination or otherwise, influenced or attempted to influence West Kentucky Coal Company or any other coal operator in bidding for coal on the TVA market." *Ibid.* These findings are supported by evidence in the record and are not clearly erroneous.

While one company may legitimately decline to deal with another (*United States v. Colgate & Co.*, 250 U.S. 300 (1919)), group boycotts or concerted refusals by some companies to trade with others constitutes a per se violation of the Sherman Act. *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 708 (1962). When the instant case was previously before the Supreme Court, one of the allegations upon which six justices relied in rejecting UMW's contention that it was exempt from the Sherman Act was that the large companies together with the Union agreed not to lease coal lands to non-union operators, and agreed not to sell or buy coal from such companies. 381 U.S. at 660 and 674. This allegation was undoubtedly based, in part at least, upon

a land-lease provision contained in an amendment to the National Agreement and upon provisions of the Protective Wage Clause which was inserted in the National Agreement in 1958. However, plaintiffs do not on this appeal advance a claim of a concerted refusal to deal, and a review [13] of the record in light of the District Court's finding concerning these clauses (257 F. Supp. at 862) demonstrates that no Sherman violation could be founded on those clauses under *Hutcheson*, *supra*, and *Allen Bradley*, *supra*. Plaintiffs do, however, rely on the provisions of the Protective Wage Clause of 1958 in support of their contention that the Union unlawfully conspired with the Bituminous Coal Operators Association (herein the "BCOA") to restrain and monopolize trade in the coal industry.

Plaintiffs' principle contention is that the UMW, in combination with the BCOA, agreed to impose the wage and royalty scales set forth in the National Agreement upon all operators regardless of their ability to pay. One issue presented is whether the District Court properly held "that the *Pennington* case teaches that it is necessary to find predatory intent to drive small coal operators out of business in order to hold the employer and Union for a violation of the Sherman Act."

In *Pennington* the Supreme Court, in an opinion by Mr. Justice White and joined by Mr. Chief Justice Warren and Mr. Justice Brennan, stated:

> "We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the anti-trust laws could be made out on evidence limited to such behavior. But we think a union forfeits its exemption from the antitrust laws when it is *clearly shown* that

it has agreed with one set of employers to impose a certain wage scale on other bargaining units." 381 U.S. at 665. (Footnote omitted; emphasis added.)

As reflected by the Court's language immediately following the above statement, it appears that Mr. Justice White considered such an agreement to be tantamount to an agreement to eliminate competition:

"One group of employers may not conspire to eliminate competitors from the industry and the union is
[14] liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining emplcyers in the industry." *Id.* at 665-66.

Justice White thus says in effect that if a union and some employers conspire to eliminate some or all of the employers' competition, this is a violation of the Sherman Act even if the mechanism is the imposition of a wage scale which the union is free unilaterally to impose. It was upon this premise (that the purpose of the bargaining agreement was to drive some employers out of business), that Mr. Justice Douglas, joined by Justices Black and Clark, concurred:

"On the new trial the jury should be instructed that if there was an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws." 381 U.S. at 672-73.

In view of the two opinions in which a majority of the justices joined, it is here determined that the District Court's holding was correct. That court's interpretation of *Pennington* is in accord with the principle announced in *United States v. Hutcheson, supra* (that a union must act in furtherance of its own self-interest in order to retain immunity from the antitrust laws), and reaffirmed in *Allen Bradley Co. v. Local No. 3, supra*. We thus understand *Pennington* to teach that:

1) a conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act;
2) "predatory intent" (as used by Mr. Justice White (381 U.S. at 668) and by Judge Taylor) is merely
[15] shorthand, employed to describe this anti-competitive conspiracy; and
3) such an anti-competitive conspiracy must be established by "clear proof." See also *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

While the jury by its verdict in the first trial of this case had found a conspiracy between the UMW and large mine operators to put smaller mine operators out of business by a preponderance of the evidence, Judge Taylor found such a conspiracy not to have been shown by "clear proof" at the second trial. Judge Taylor properly concluded that a degree of proof less than the "beyond a reasonable doubt" requirement in criminal cases but greater than the "preponderance of the evidence" standard of civil actions is necessary. 257 F. Supp. at 829. The District Court's determination that judged by this standard evidence of sufficient probity had not been offered is supported by a review of the record and is not clearly erroneous. Rule 52 F.R.Civ.P.

Justice White, in his opinion joined by two other justices, also held that an agreement between employers and a union to impose a particular wage scale on other employers is a per se violation of the Sherman Act. It seems doubtful that this per se view is supported by a majority of the Supreme Court. We believe, however, that decision on this point is unnecessary since we agree with the District Court that the disputed Protective Wage Clause, properly construed, did not require the Union to impose the wages therein contained on the nonsignatory employers. The Protective Wage Clause is capable of two reasonable constructions, and the District Court properly held that in such circumstances the construction should be adopted that does not result in a violation of law. *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686 (1931); *Perry Coal Co. v. N.L.R.B.*, 284 F.2d 910, 914 (7th Cir. 1960). We add the observation, however, that even without the operation of this principle of law we would incline
[16] to the conclusion that the agreement did not constitute a violation of the Sherman Act, the record containing insufficient evidence from which a conspiracy or other violation could be found to have been clearly shown.

In conclusion, we find that the District Court properly dismissed the complaint in this case on the ground that plaintiffs failed to prove "that defendant engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged. . . ." Accordingly, the judgment of the District Court in case No. 17,445 is affirmed.

No. 17,452
No. 17,453

After the remand of *Pennington* to the District Court for retrial, these two cases (and five others not herein

considered) were consolidated with it for trial. Following trial, they were considered and disposed of in the lengthy opinion of Judge Taylor hereinabove referred to (257 F. Supp. 815), and although separately appealed oral arguments in all three cases were heard in this court at the same sitting. The causes of action involved on appeal were alleged in cross-claims in actions instituted by the UMW, but its claims were resolved by summary judgments and under the provisions of the pretrial orders entered in each case the cross-complaints were considered as complaints. The cross-plaintiffs accordingly appear here as plaintiffs-appellees, and the UMW, which perfected these two appeals, as defendant-appellant. The plaintiff-appellee in case No. 17,452 is the Dean Coal Company, and in No. 17,453 W. R. Parton, d/b/a W. R. Parton Coal Company, hereinafter referred to as "Dean" and "Parton" respectively.

Although included in the cases referred to by Judge Taylor as constituting "the last chapter in a spate of litigation between coal operators in [certain Tennessee counties] and United Mine Workers of America," and while
[17] there is some overlapping of the questions involved, the issues in these cases are considerably narrower than in *Pennington*. We mentioned earlier that the facts have been developed fully in previously reported opinions, and the facts in the *Dean* and *Parton* cases appear in detail in Judge Taylor's opinion (see particularly 257 F. Supp. 865-868). In their final forms the complaints asserted claims against the UMW for alleged Sherman Act violations and for alleged violations of the law of Tennessee. Final judgment was entered in the District Court dismissing the cause of action alleged against the UMW under the Sherman Act with prejudice, and for plaintiffs-appellees under the alleged violations of Tennessee law. Judgment in favor of Dean against the UMW was entered for com-

pensatory damages in the amount of $101,787.41, punitive damages in the amount of $50,000, for a total of $151,787.41, with interest plus costs. Judgment was entered in favor of Parton for a violation of the Tennessee law in the amount of $110,000 as compensatory damages, $50,000 as punitive damages, for a total of $160,000, with interest plus costs. It is from those judgments that the UMW has appealed to this court.

The first question is whether the District Court properly concluded that it had pendent jurisdiction of the common law action in these cases brought originally as actions arising under the Sherman Act. Even though a diversity of citizenship between the parties does not exist, a federal court has pendent jurisdiction to resolve a state law claim asserted under certain circumstances with a federal claim. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938); *Hurn v. Oursler*, 289 U.S. 238 (1933). Such pendent jurisdiction was also found to exist in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). Therein the Supreme Court stated two of the requirements for the exercise of pendent jurisdiction to be (1) that the federal claim have "substance" so as to confer jurisdiction of the subject matter on the court in which the action is commenced and (2) that the "state and federal claims must derive from a common nucleus of operative fact."

[18] The UMW concedes, in spite of the District Court's ultimate dismissal of Dean's and Parton's federal claims, that those claims were "substantial" within the meaning of *Gibbs*. It strenuously challenges the existence of a "common nucleus of operative facts," arguing that the Sherman Act claim "embraces so many allegations irrelevant in time and content to the state claim, that to find there is a 'common nucleus of operative fact' is to destroy the practical significance of this requirement." However,

it cannot be denied that there is at the very least a significant overlapping of the facts alleged and proved under the Sherman Act and state law claims, and it cannot be said that the District Court's resolution of this issue in favor of jurisdiction was a clearly erroneous abuse of discretion. The next question presented concerns the degree of proof required in support of Dean's and Parton's allegations in order to entitle them to recover, and whether or not the District Court applied that standard. We have earlier stated our agreement with Judge Taylor's conclusion that under Section 6 of the Norris-LaGuardia Act (296 U.S.C. § 106) as interpreted by *Gibbs*, (*UMW v. Gibbs*, *supra*, 383 U.S. 715) "clear proof" is required to hold a union liable for damages in which it actually participated or authorized or ratified. In arguing that the District Court used the Section 6 and *Gibbs* requirement as to quantum of proof the plaintiffs-appellees quote statements made from the bench during the trial which indicate an awareness of that standard. However, although specific reference to that requirement is frequent and cogent in Judge Taylor's discussion of the *Pennington* case, he makes no reference to it in connection with the *Dean* and *Parton* cases. On the contrary, from the discussions therein of union responsibility "for acts performed and instigated by [its] agents in the course of their employment," and in connection with the establishment of the agency relationship, it seems possible that only the common law standard of a preponderance of the evidence was contemplated. We

[19] are of the opinion that in this lengthy record of a protracted trial, including testimony of interference with hauling operations, verbal threats of work stoppages, the wanton discharge of firearms, the placing of a dynamite charge (albeit unexploded), distribution of gasoline in areas of frequent destruction by arson,

all in a locality tense with fear and anger, evidence exists from which conspiracy to commit illegal violence could be found, and that evidence was presented upon which damages under Tennessee law could be predicated. As already indicated, however, we cannot on that record and from the District Court's opinion determine that the proper requirement as to the degree of proof was applied as to the elements essential to liability and recovery of damages in the amounts assessed. Accordingly, it is concluded that a remand for the purpose of reviewing the evidence in the light of the proper standard of proof is required.

If liability is established upon remand, either by reexamination of the evidence in light of the proper standard or by confirmation that such standard had in fact been applied in the first instance, an award of damages attributable to the UMW's violence would of course be proper. The Union claims, however, that the District Court improperly computed the amount of compensatory damages awarded Dean and Parton. While the findings as to the amount of compensatory damages appear to be clearly erroneous, we here hold only that the District Court's general and conclusory findings in this regard must be supported by additional specific subsidiary findings.

It is initially observed that the Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966) held that the "permissible scope of state remedies in this area [of violence in labor disputes] is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity." See also *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964). And in *International Union, U. A., A. & A.I.W. v. American Metal Products Co.*, ... Tenn. ..., 408 S.W.2d 683, 707 (1964), the court held

[20] that "plaintiff is not entitled to recover losses resulting from the exercise by the defendant Unions of their lawful right to strike." In the case at bar, it cannot be said that the District Court, which found inter alia that the losses sustained by Dean and Parton were "caused by violent conduct" instigated and carried out by UMW members and officials, disregarded the above preemption principles and permitted recovery for losses sustained by the Companies due to lawful union activity.

The Union contends that the compensatory damages awarded the Companies are speculative. It is recognized that the computation of damages in a case such as this is a difficult task, where many factors must be taken into account, and where absolute, objectively demonstrable accuracy can be neither expected nor required. Because of the complexity of the subject matter here, general findings provide an inadequate basis for review by this Court.

The Dean Coal Company's income tax returns showed the following record of profits and losses:

1955	$32,407.22
1956	31,710.20
1957	17,226.84
1958	2,469.32 Loss
1959	37,531.47 Loss
1960	13,249.94 Loss
1961	1,233.39
1962	13,441.38

The District Court found that Dean "suffered an operating loss in 1959 on account of the wrongful and unlawful acts of the defendant of $37,537.47 and an operating loss in 1960 of $13,249.94, or a total operating loss of $50,787.41." This latter figure, together with the Company's loss of

profits, discussed below, formed the basis for the compensatory damages awarded Dean by the District Court. However, the violence which allegedly interrupted the Company's operations did not commence until
[21] March 16, 1959, and absent some further explanation, the Company's loss for the entire year 1959 cannot properly be attributed to UMW activities.

With respect to the issue of Dean's loss of profits the District Court set forth its general finding that: "There is proof supporting a total loss of profits for 1958-60 of $17,000.00 a year, or a total of $51,000.00." No claim is made for damages caused by the Union's violence during the year 1958, and the District Court's inclusion of that year was very likely a typographical or inadvertent error, as claimed by Dean. If, however, the intended period was 1959-61, the court would appear to have failed to consider the 1961 profit of $1,233.39 shown on the Company's tax return, and to have deducted that amount from the total.

Finding support for the conclusion that Dean Coal is entitled to a judgment of about $50,000 in lost profits (in addition to the losses it actually sustained) for a three year period after the Union interference began in March 1959, is more difficult, particularly in light of the fact that the Company's income dropped sharply from a profit of approximately $31,000 in 1956, to a loss of $2,400 in 1958. The trial court noted that the owner of Dean Coal Company attributed the 1958 loss to a heart attack he suffered in October of that year, and to low sales prices and unusually high equipment repair costs. The owner's heart attack was not shown to have had any significant economic impact upon the Company, while the explanation of low sales prices is in harmony with the District Court's previous finding that "in 1958 the bituminous coal industry felt a recession

and decreasing demand for coal so that the price of coal in the markets was to some degree affected." There was also evidence that labor costs increased during the general period under consideration. Indeed, the substance of one of the coal producers' claims in the antitrust phase of these cases was that the Union participated in a deliberate drive to suppress the price of coal on the TVA spot market, and in attempts to obtain from the Secretary of Labor
[22] and under the Walsh-Healey Act minimum wage rates which small operators could not pay. We believe the findings of the District Court should reflect what impact, if any, these factors had in the determination that Dean had the potential for profitable production during 1959 and thereafter. The decision on this complex issue of damages provides an insufficient basis for review in that there are no "subsidiary findings to support the ultimate conclusions of the court." *Deal v. Board of Education*, 369 F.2d 55, 64 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); see *Tappan Co. v. General Motors Corp.*, 380 F.2d 888 (6th Cir. 1967).

The Parton Coal Company, which also recovered damages from the UMW for tortious interference with its business, showed a pattern of declining income similar to that of Dean. Parton's income tax records disclose the following profits and losses:

1954	$19,865.90
1955	12,088.14
1956	25,409.03
1957	1,633.41
1958	9,414.22 Loss

The District Court found generally that Parton "was making a profit, or capable of making a profit of at least $15,000.00 a year over a period of several years." Per-

haps by coincidence, the amount of $15,000 per year roughly approximates Parton's average yearly earnings for 1954 through 1957, excluding the 1958 loss which Parton attributed to the building of more haul roads and other road work. As in the *Dean* case, the District Court's general finding here should be supported by subsidiary findings actually assessing Parton's economic situation during the pertinent period of time.

We do not find, as claimed by the UMW, that the District Court erred as a matter of law in allowing punitive damages in these cases.

The remaining issue in the *Dean* and *Parton* cases concerning the taxation of costs will be treated below.

[23] Nos. 17,446 through 17,451

The *Pennington*, *Dean* and *Parton* cases, as well as the five other cases numbered 17,447 through 17,451 now on appeal, were consolidated for trial. As has been stated, the District Court found for the UMW on the antitrust claims bottomed on the Sherman Act, but found for Dean and Parton on their claims under the state or common law. Although the court acknowledged that "the interest of the attorneys in the antitrust phase of the lawsuit overshadowed the alternative claims based on Tennessee law," the costs of the consolidated cases were taxed against the UMW. The Union appeals this determination in all eight cases noted above. (The Union's appeal from the taxation of costs in *Pennington*, No. 17,446, is not to be confused with the Company's appeal in that case from the court's decision on the merits, No. 17,445).

Two questions are presented in connection with the manner in which costs were taxed in these cases: 1) Did the District Court have the power to exercise its discretion

to tax costs against the Union, and 2) if so, did the court abuse its discretion.

Rule 54(d), F.R.Civ.P., provides in pertinent part:

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ."

Section 4 of the Clayton Act (15 U.S.C. § 15) provides in pertinent part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

It is the UMW's position that an "express provision [for costs]", within the meaning of Rule 54(d), is found
[24] in Section 4 of the Clayton Act, thereby precluding the exercise of discretion the District Court would ordinarily have in awarding costs under the "unless" clause of the Rule. See *National Transformer Corp. v. France Mfg. Co.*, 215 F.2d 343 (6th Cir. 1954); *Solo Cup Co. v. Paper Mach. Corp.*, 359 F.2d 754 (7th Cir. 1966). This contention cannot be accepted.

Section 4 of the Clayton Act provides in effect that a prevailing plaintiff in an antitrust action shall recover "the cost of suit, including a reasonable attorney's fee." To this extent, that section makes "express provision" for costs, and a district court would be powerless under Rule 54(d) to deny such plaintiff his costs in the exercise of discretion. It does not follow, however, that an unsuc-

cessful plaintiff to an antitrust case is conclusively deprived of a favorable disposition of costs by the court where the circumstances warrant. Neither reason nor authority requires such a result. Simply stated, Section 4 does not make "express provision" for costs in cases where a plaintiff fails to prove his antitrust claims, and the District Court therefore had discretion in the taxation of costs in these cases.

The remaining question is whether the District Court abused its discretion in taxing costs against the UMW, which prevailed on the Sherman Act claims. We are constrained to answer in the affirmative.

This Court has held that "The prevailing party is prima facie entitled to costs and it is incumbent upon the unsuccessful party to show circumstances sufficient to overcome the presumption." *Lichter Foundation, Inc. v. Welch*, 269 F.2d 142, 146 (6th Cir. 1959). Such circumstances might be where "the amount of taxable costs actually expended were unnecessary or unreasonably large under the circumstances, where the denial of costs was in the nature of a penalty for injecting unmeritorious issues into the case or unnecessarily prolonging the trial . . . or where the judgment recovered was insignificant in comparison to the amount actually sought and actually amounted to a victory for the defendant." *Id.* at 146. See also
[25] *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950). The *Lichter* decision further negates the conclusion that the ability of a party litigant to pay costs is a valid criterion in assessing them.

In denying the UMW's motion to award costs in its favor and against "the unsuccessful coal companies to the extent that the costs of the consolidated actions pertain to the anti-

trust phase of the consolidated actions," the District Court stated:

> "With respect to the taxation of court costs, the Court is further of the opinion from all the circumstances shown in the record that equity required that the costs of the consolidated cases be paid by the UMW."

While we can only surmise what "equities" the lower court had in mind in denying the Union's motion, it very well may be that the trial judge was unsympathetic toward the established policy of the UMW, of attempting to improve the working and living standards of its members throughout the industry without any apparent regard for the continued existence of marginal operators. This clearly would be an impermissible ground upon which to tax the Union all the costs in these cases. In any event, we find no reasonable ground in support of the District Court's action and accordingly set aside the award of costs against the UMW.

Although the Dean and Parton coal companies prevailed on only one of two grounds advanced, they are to be deemed "prevailing parties" (See *Hines v. Perez*, 242 F.2d 459 (9th Cir. 1957); *Westchester Fire Ins. Co. v. Hanley*, 284 F.2d 409 (6th Cir. 1960), *cert. denied*, 365 U.S. 869 (1961)), and should the decision in their favor be reaffirmed upon remand, the portion of the costs attributable to those cases may properly be assessed against the UMW.

The judgments appealed from in cases Nos. 17,446 through 17,453, inclusive, are reversed and the causes remanded for further proceedings not inconsistent with this opinion.

APPENDIX B

[Sherman Act §§1 and 2; Clayton Act §§4 and 6]

15 USCA:

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§2. MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

* * *

§ 15. SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 17. ANTITRUST LAWS NOT APPLICABLE TO LABOR ORGANIZATIONS

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraints of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

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29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52: STATUTORY RESTRICTION OF INJUNCTIVE RELIEF

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

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29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

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29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein de-

fined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 4 Stat. 70.

29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be hald responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

Labor Management Relations Act, 1947 (29 USCA):

§ 141: SHORT TITLE; CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its

relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, 3:17 p.m., E.D.T., c. 120, § 1, 61 Stat. 136.

§ 151: FINDINGS AND DECLARATION OF POLICY

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encourag-

ing the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, 3:17 E.D.T., c. 120, Title I, § 101, 61 Stat. 136.

§ 157. RIGHT OF EMPLOYEES AS TO ORGANIZATION, COLLECTIVE BARGAINING, ETC.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140.

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant

to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than

the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * * * *

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 584, § 1(b), 65 Stat. 601.

* * * * *

15 USCA (National Policy of Employment Act)

§ 1021. DECLARATION OF POLICY

The Congress declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power. Feb. 20, 1946, c. 33, § 2, 60 Stat. 23.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 558

JAMES M. PENNINGTON, *et al.*,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT UNITED MINE WORKERS OF AMERICA IN OPPOSITION

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IN THE

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OCTOBER TERM, 1968

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT UNITED MINE WORKERS OF AMERICA IN OPPOSITION

OPINIONS BELOW

Petitioners accurately note (Pet. 2) the Sixth Circuit's Opinion is as yet unreported and is printed in Appendix A to the Certiorari Petition, pp. 1-28. The Petition accurately recites the District Court's Opinion, reported in 257 F. Supp. 815, appears in the Certified Record (138-253a).[1]

---

[1]The United States Court of Appeals for the Sixth Circuit is referred to herein as "Sixth Circuit".

The United States District Court for the Eastern District of Tennessee, Northern Division (at Knoxville) is referred to as "district court".

Page references are to the Joint Appendix and Supplemental Appendix in the Sixth Circuit and filed as part of the Certified Record in this Court's Clerk's office. The abbreviation "Pet." refers to the Petition for Writ of Certiorari and "Pet. App. A" refers to Appendix A to said Petition.

JURISDICTIONAL GROUNDS

The jurisdictional requisites are adequately set forth in the Petition (p. 2).

STATUTES AND RULES INVOLVED

The statutory provisions involved are Sections 1 and 2, Sherman Antitrust Act (15 USCA 1, 2); Sections 4 and 6, Clayton Act (15 USCA 15, 17); Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia Act (29 USCA 102, 104 and 106); and the Labor Management Relations Act, 1947 (29 USCA 141, 151, 157 and 158). Petitioners erroneously include (Pet. 2) the National Employment Act (15 USCA 1021).

Also involved is Rule 52(a), Federal Rules of Civil Procedure.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

UMW does not accept the statement of Questions Presented, as set forth in the Petition (p. 3). In lieu thereof, UMW submits the following:

1. Did the Sixth Circuit and the district court properly hold that under this Court's *UMWA* v. *Pennington*, 381 U.S. 657, proof of a conspiracy between employers and labor formed with the intention of driving competitors out of business is essential to a finding that a labor union has violated the Sherman Antitrust Act?

2. Did the Sixth Circuit and the district court properly hold that predatory intent or the anticompetitive conspiracy must be established by clear proof, under guidelines of both *UMWA* v. *Pennington*, 381 U.S. 657, and *UMWA* v. *Gibbs*, 383 U.S. 715?

3. Did the Sixth Circuit and the district court, under applicable law and the evidence, properly hold that the Protective Wage Clause contained in the National Bi-

tuminous Coal Wage Agreement of 1950, as Amended Effective December 1, 1958, did not constitute a violation of the Sherman Act.

4. Was the Sixth Circuit's affirmance of the district court's dismissal of the antitrust claims proper under Rule 52(a), Federal Rules of Civil Procedure?

COUNTERSTATEMENT OF THE CASE

A. The Kind of Action and the Judgments Appealed.

Petitioners are seven coal companies,[2] sued by Trustees of the United Mine Workers of America Welfare and Retirement Fund to recover money judgments for delinquent royalties as signatories to the National Bituminous Coal Wage Agreement of 1950, as amended, each of which filed a cross-claim against United Mine Workers of America,[3] and Dean Coal Company which filed an original action against UMW under the Sherman Antitrust Act (15 USCA 1, 2), based upon an alleged conspiracy between UMW and major coal companies (not parties hereto) to force small coal companies out of business.

UMW denied the conspiracy charges; asserted all such agreements were obtained by its independent efforts, acting unilaterally and in its own self-interest, free of alliance or combination with an employer or groups of employers for a predatory anticompetitive purpose, and that its acts were motivated by legitimate labor goals to secure uniformity of union standards of wages and working conditions for its members; and alleged that

[2]The seven coal companies are James M. Pennington, et al.; Harry P. Stansberry, t/a Stansberry Coal Company; Jesse C. and Nola Fesler, t/a Fesler Coal Company; U. R. and Mrs. U. R. Arnold, t/a Arnold Strip Mining Company, a partnership, and Arnold Coal Company, Inc.; Tennco, Inc.; E. C. McPherson, t/a E. C. McPherson Coal Company; and M. W. Norquest and E. C. McPherson, t/a McPherson Coal Company.

[3]Called "Fund" and "UMW", respectively.

by virtue of *Clayton's* Sections 6 and 20 (15 USCA 17, 29 USCA 52) and the Norris-LaGuardia Act (29 USCA 101, *et seq.*) the negotiation and execution by UMW of its agreements and its conduct in connection with their enforcement do not constitute a *Sherman* violation.

Petitioners accurately note this Court's 1965 delineation of guidelines (herein discussed, *post*, pp. 4-6) in *UMWA* v. *Pennington*, 381 U.S. 657, 672, which reversed and set aside a jury verdict and judgments against UMW, and remanded the case for retrial consistent with Mr. Justice White's opinion.

Upon remand and upon motion by Petitioners, the *Pennington* case was consolidated for trial with the remaining seven cases and, by agreement, tried by the district court without a jury. In a written Memorandum Opinion (138a) by District Judge Robert L. Taylor, the court found that Petitioners failed to prove UMW engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states, as alleged in the complaint (239a). The Sixth Circuit affirmed (Pet. App. A 17). While Petitioners correctly observe the Sixth Circuit affirmed judgments of the district court (Pet. 2), they fail to advise this Court that such affirmance related only to judgments in Case No. 17,445—the antitrust claims (Pet. App. A 16); but upon UMW's appeals the Sixth Circuit reversed the district court's award of costs to Petitioners who had failed to prevail in their antitrust claims involved in Cases Nos. 17,446 through 17,451 (Pet. App. A 28).

B. This Court's Guidelines in *Pennington*.

In *Pennington*, this Court delineated, in its majority opinion, guidelines for decision of the antitrust phase.

It held it is "beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the anti-trust laws and . . . may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers" and no case under *Sherman* "could be made out on evidence limited to such union behavior" (381 U.S. 665).[4] It avowed:

> "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union"

and, further,

> "The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy" (p. 665, fn. 2).

Underlying Pennington's premise is recognition that "a legitimate aim of any national labor organization is to obtain uniformity of labor standards" and, as *Apex Hosiery Co. v. Leader*, 310 U.S. 469 held, "a consequence of such union activity may be to eliminate competition based on differences in such standards" (381 U.S. 666).

Pennington recognizes that ". . . a union forfeits its exemption from the anti-trust laws when it is *clearly shown* that it has agreed with one set of employers to

[4]The premise is emphasized by Mr. Justice White's further statement: ". . . a union may make wage agreements with a multi-employer bargaining unit and *may in pursuance of its own union interests* seek to obtain the same terms from other employers" (381 U.S. 665). [All emphases are supplied, unless otherwise indicated.]

impose a certain wage scale on other bargaining units" (381 U.S. 665). This precedes the significant statement that "One group of employers may not conspire to eliminate competitors from the industry *and the union is liable with the employers if it becomes a party to the conspiracy*" (p. 665-66).

C. This Court's Guidelines As to the Standard of Proof.

Forfeiture of a union's exemption from antitrust laws, Mr. Justice White stated, results only *"when it is clearly shown"* the union has entered into an extra-unit agreement. Subsequently this Court held in *UMWA* v. *Gibbs*, 383 U.S. 715, that *Norris-LaGuardia's* Section 6 conditions a union's responsibility in a federal court for unlawful actions of its officers, members or agents upon *"clear proof"* of the union's actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

D. Both the Sixth Circuit and the District Court Agreed on *First Pennington's* Requirements to Prove a *Sherman* Violation.

The Sixth Circuit agreed with the district court's holding that *first Pennington* requires a conspiracy between employers and labor formed with the *intention* of driving competitors out of business in order to find a *Sherman* violation; that predatory intent as used in *first Pennington* is merely shorthand, employed to describe this anti-competitive conspiracy; and such conspiracy must be established by clear proof.

E. The Sixth Circuit Agreed With the District Court That Petitioners Failed to Prove a *Sherman* Conspiracy.

Implementing *Pennington* and *Gibbs* guidelines, the district court found Petitioners "failed to prove, either

by a preponderance of the evidence or by the standards of evidence" established in *Gibbs* that UMW engaged in a conspiracy (239a). To Petitioners' argument that the conspiracy's inception occurred with execution of the 1950 Agreement, the district court found (231a) "The 1950 negotiations were carried on under the surveillance of the National Labor Relations Board and the Court, two injunctions having been issued, one at the instance of the NLRB and the other at the instance of the Department of Justice. The injunction directed the Union and the operators to bargain in good faith" and the district court observed, "It would seem a bit unusual that the Union and the operators who had been fighting each other for some fifteen years would enter into a conspiracy to violate the antitrust laws" (174a).

It found that "Ten witnesses, each of whom was in a position to know, testified positively that there was no predatory price fixing" and that "Included in this list were UMW officials who likewise denied any participation in any alleged price fixing (237a).

The district court found, and *Petitioners did not challenge its findings,* that UMW investments and loans in West Kentucky Coal Company and Nashville Coal Company "were for organizational purposes" (189a). It stamped as insufficient the proof to establish the claim that West Kentucky or any other coal operator bid on TVA coal to depress coal prices on the TVA market and thereby drive small coal operators, including Petitioners, out of business; or that "UMW, by arrangement, combination or otherwise, influenced or attempted to influence" West Kentucky or any other operator in bidding for coal on the TVA market (238a); or that West Kentucky or any other operator by arrangement fixed

the price or attempted to fix coal prices on that market (237a). It declared West Kentucky prices appeared to have been a matter of "sound business judgment" and "not evidence of predatory pricing" (225a). Of these findings, the Sixth Circuit declared, "These findings are supported by evidence in the record and are not clearly erroneous (Pet. App. A 12-13). *Significantly, Petitioners did not in the Sixth Circuit, and do not in this Court, attack these district court findings relating to the TVA market as being without evidentiary support.* The Sixth Circuit concluded that by the required standard of clear proof "evidence of sufficient probity had not been offered" and that such district court determination "is supported by a review of the record and is not clearly erroneous."

In conclusion, the Sixth Circuit found the district court properly dismissed the complaint on the ground that Petitioners failed to prove "that defendant engaged in a combination of conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged . . ."

F. The Sixth Circuit and the District Court Alike Rejected Petitioners' Contention That PWC Constituted a *Sherman* Violation.

The district court found that by PWC's Paragraph A., "UMW only obligates itself for full compliance of the terms of the contract *by the 'parties signatory thereto'*" (235a) and Paragraph B. "manifests an intention to protect the continuity of work of the employees against the practice of employers procuring from others by land-lease, subcontract or otherwise coal that was produced under terms and conditions less favorable than those provided in the contract with the Union" (235a).

The Sixth Circuit sanctioned the district court's interpretation of the PWC in the 1958 Agreement, holding that PWC, properly construed, did not require UMW to impose the 1958 Agreement's wages on non-signatory employers; it approved the district court's implementation of the legal principle which held that PWC is "capable of two reasonable constructions," and that construction should be adopted which does not result in a violation of law (Pet. App. A 17). The Sixth Circuit further held that "even without the operation of this principle of law we would incline to the conclusion that the agreement did not constitute a violation of the Sherman Act, the record containing insufficient evidence from which a conspiracy or other violation could be found to have been clearly shown."

Contrary to Petitioners' *implication* (Pet. 19) that UMW sought, by violence, to impose the 1958 Agreement's terms upon east Tennessee coal operators, the district court found that such conduct "is insufficient to show a Sherman Act antitrust violation" (239a). Petitioners did not in the Sixth Circuit, nor do they in this Court, challenge that finding or the district court's further finding as to Paragraphs A. and B.

THE FACTS

A. Unchallenged Denials of a Conspiracy.

No witness and no documentary evidence showed UMW conspired with any non-labor group; and positive unchallenged denials by UMW and company officials alike show there was no conspiracy.[5] Indeed, the district court found, *without complaint by Petitioners in the Sixth Circuit* or in this Court that "Ten witnesses, each

[5] 781a, 1308a, 1356-57a, 1404a, 1407a, 1409a, 1420a, 2114-15a, 1776a,

of whom was in a position to know, testified positively there was no predatory price fixing" (237a).

B. UMW's Historic Policy for National Uniformity of Labor Standards.

From its origin as a labor union in 1890, UMW has striven for national uniformity of wages and working conditions. UMW Conventions through the years mirror authoritative expressions to this policy.* An operator's geographical or economic situation does not alter the labor the miner expends or the wherewithal he and his family need to live decently (1331a, 1364-65a). UMW experiences show that wage-cutting to reduce cost and prices by one operator induces a cycle of wage cutting by other operators which results in progressively depressing wages until it reaches the lowest level that is payable (1545-46a, 1363a). In 1941, the National Defense Mediation Board, taking note of UMW's historic policy, observed that day-wage uniformity had been disrupted by the industry's chaotic condition between 1924 and 1933, and recommended elimination of the 40-cents north-south differential, concluding that the increased labor cost entailed in eliminating the differential is not sufficient to justify the Board's recommendation that the differential be maintained to preserve existing fair competitive opportunities (1585a; S.A. 2298a). From 1941 to the present there has been almost complete uniformity of wage rates for day-men and a flat across-the-board wage increase given to the piece-worker has been equal in amount to the increase given the day-worker (1368a). Though differentials still exist, over all UMW accomplished its historic policy of wage uniformity.
1777-78a.

*1539a, 1540a, 1542a, 1547a, 1549a, 1552-55a, 1558a, 1559a.

C. UMW's Authority to Negotiate a Collective Bargaining Contract Derives From Its Members.

UMW's authority to negotiate a collective bargaining agreement derives from its membership, granted at its Conventions. Only the Policy Committee may approve a contract for execution. Contrary to Petitioners' statement (Pet. 12), undisputed evidence shows UMW is free to negotiate a labor agreement at variance with the National Agreement.[7] Although each change would have to have the Policy Committee's sanction, every item of the contract was negotiable. But Tennessee operators "would not sign a contract; they would not offer anything in lieu thereof" except what UMW regarded "impossible"; they wanted no pension program and only a limited hospitalization program; and they wanted to eliminate benefits coal miners in that area had enjoyed over 20 years in UMW's contract (1898-99a).

D. BCOA's Formation Was Unrelated to the 1950 Agreement.

As already noted (*ante*, pp. 6-8), neither in the Sixth Circuit nor in this Court do Petitioners' challenge the district court's rejection of Petitioners' contention that the 1950 Agreement resulted from a conspiracy.

It is undisputed that UMW had nothing to do with the formation of Bituminous Coal Operators Association (BCOA), formed as an unincorporated group on July 22, 1950 (1356a, 1769a, 2181-82a). Open to all operators, large or small, when formed BCOA represented 262 individual coal companies producing 50 per cent, or more, of the tonnage (1771-72a). One-half of its companies mined less than 100,000 tons a year (1771a). Of alleged co-conspirators, Consolidation Coal Company and Pittston Coal Company alone were BCOA members. Neither

[7] 1296a, 1407a, 1777a, 1927-28a.

West Kentucky nor Nashville Coal was a member (S.A. 2315; 2144a).

E. Increased Labor Costs in the Post-1950 Period Resulted From Arms-Length Collective Bargaining.

Whereas Petitioners assert (Pet. 13) that amendments to the National Agreement "steeply increased the labor costs in the coal industry", undisputed evidence shows that in the 14-year period following the 1950 Agreement's execution, wages increased $11.50 per day, with a 10-cent royalty increase in 1952 [which has since remained unchanged (1313a)]; and that average weekly earnings in the bituminous coal industry were $133.27, compared with $137.70 in the motor vehicle industry and $138.77 in the steel industry (2266a). In the 8-year period of 1958-64, coal miners had increases of $2.00 in each of the 1958 and 1964 Agreements, amounting to 6¼ cents per hour (1410a). Indeed, when the miner's 1941 take-home pay is compared with that in 1964, and the purchasing power is given consideration, the miner has 10 cents less under his 1964 wage scale than he had in 1941 (1410a).

Asked if successive wage rate increases were "designed to meet the increased ability" of large companies to pay them, UMW's President stated, *"mine workers had no relation to those elements of consideration"* and *"The mine worker was merely not getting a compensatory rate for his services in an ultrahazardous industry, affected with much unemployment; and that was the sole consideration of the United Mine Workers"* (805a). UMW was representing the interests of UMW members and was not concerned with what the operators would do as affecting those questions over which the UMW had no jurisdiction (808a).

F. Competition of Coal With Competitive Fuels Necessitated Greater Mechanization.

While Petitioners assert that wage agreements since 1950 were tailored to fit the new technology of intensive mechanization, favored by geology and better mining conditions (Pet. 13), historically mechanization was a competitive medium employed by coal operators prior to and after 1900, and a normal procedure long prior to 1950 when Petitioners assert the alleged conspiracy was made.[6] Mechanization was not an issue in the negotiations preceding execution of the 1950 Agreement (1767a).

The coal industry turned to improved mechanization as competitive fuels displaced coal. In 1940 coal provided 47.2 per cent of total fuel energy consumed in the United States, as compared with 43.8 per cent provided by crude oil, petroleum and natural gas; but by 1950 coal's share had dropped to 34.8 per cent and the share of crude oil, petroleum and natural gas had increased to 57.5 per cent (2277a, 2027-29a)—a trend which has continued until in 1964 coal's share was reduced to 21.8 per cent, while the other fuels' share had increased to 73.8 per cent (2277a). Coal had to be concerned about external competitive forces.

Through increased mechanization, in 1961 the American miner averaged 12 tons a day, compared with 5-6 tons in 1940 (1713a, 2036a). In 1964, the average increased to 16.84 tons per man (2036a), and in Tennessee the average in 1940 was 3.38 tons; in 1950, 4.67 tons; and in 1964, 10.15 tons (2039a).

Had the coal industry not increased productivity through greater mechanization with its attendant lower-

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[6] 995a, 1706a, 1042-43a, 1774a.

ing of costs, it would have succumbed to its competitors, such as oil, gas and diversified fuels made from coal or petroleum bases (1706-07a). UMW has never opposed mechanization, not because of any conspiratorial arrangement, but because of UMW's belief in the free enterprise system which recognizes that investment for profit may endure only through increased productivity, and the belief that mechanization is a management prerogative to buy such equipment as management chooses and UMW does not attempt to abridge it (1304a, 1706a, 1709a).

G. The PWC in the 1958 Agreement Was a Labor Standards Clause Protecting UMW Members' Work Opportunities and Standards.

The Protective Wage Clause (PWC) had its genesis in 1943 contract negotiations when UMW sought, and the National War Labor Board directed, that each agreement contain a clause to protect the contract and preserve the interests of the miners. It read: *"operators agree that they will not let any operating mines subject to this agreement as a subterfuge"* to avoid the Agreement's provisions. A labor agreement, negotiated by the Secretary of the Interior and known as the Ickes-Lewis Agreement, contained an identical clause (2128a, 2130a). Subsequent agreements negotiated annually from 1943 through 1951 carried the anti-lease clause (2130-32a).

The clause was expanded in the 1952 amendment to the 1950 Agreement when signatory operators agreed that:

> "operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this

agreement) be put into production. *The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement"* (1688-89a, 2132a).

This same language was carried forward in the 1955, 1956 and 1958 Agreements (2132a).

For six years following the 1952 Agreement's execution, UMW believed signatory operators were "chiseling" on the contract (2133a).

During negotiations for the 1958 Agreement, UMW proposed and BCOA *rejected* a protective wage clause. A revised proposal on November 25, 1958, accompanied a letter setting forth the clause's purpose and the reasons therefor: ". . . it has become mandatory that the union find a way in which to protect its members employed in the . . . industry against the ever-encroaching evils and practices of sub-contracting, the production and procurement of coal not mined in accordance with the wage scales and other terms and conditions of the national agreement, and other companion evils flowing therefrom" (2134a). Continuing, the letter recited: "Sub-contracting by signatory operators is nothing more than pure evasion of their contractual obligation to pay and maintain the agreed standards of wages and . . . . vitally affects our members because it progressively undermines our members' tenure of employment and results in removing and withdrawing from them more and more work and hence more and more jobs are lost to them" (2134a). The letter charged, "many signatories of the present national agreement, indeed members of your own association, have been, and presently are, guilty of such nefarious practices", thereby becoming assisting parties "to those who seek to debase and

lower our standard of wages, hours, safety requirements, work opportunities and other benefits" which UMW members are entitled to have protected (2134-35a).

Agreement reached on PWC required coal mined, produced, prepared, procured or acquired by signatory operators shall be mined under labor standards as favorable to employees as those in UMW's contract (2242a). Lewis announced that labor standards and job opportunities to which UMW members are contractually entitled have been achieved after long years, and UMW seeks to safeguard these by PWC (2136a). Reluctantly, BCOA agreed to avoid an interruption in the supply of coal (2137-38a).

Operators complained the union was not enforcing contracts already signed among particular signatories (1403a), causing them to ask UMW for a reciprocal contractual commitment, and UMW's senior counsel testified that UMW acquiesced it would enforce the Agreement *as to all signatories thereto equally* (2185-86a).*

PWC was not to become effective until April, 1959. It was never enforced (2079a). Originally delayed by mechanics of setting up the Joint Industry Contract Committee (JICC), created by PWC, its activities were suspended on November 4, 1959 because of doubt concerning its legality under the Landrum-Griffin Act which barred "hot cargo" clauses (2138a). PWC was specifically eliminated from the 1964 Agreement dated March 23, 1964 (1283a). JICC was dissolved March 31, 1964 (2082a).

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*The district court noted that Senior Counsel Welly K. Hopkins so testified and that neither Paragraph affected anyone except those signatory to the contract. The district court observed that "This testimony would only be competent if the contract is ambiguous" and that "both parties" agree "the contract is not ambiguous" (236a).

ARGUMENT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

A. The Instant Case is Not One of First Impression on the Application of Antitrust Law to Industry-wide Bargaining.

Contrary to Petitioners' assertion, "This is the case of first impression on the application of antitrust law to industry-wide bargaining" (Pet. 20), the first question posed in the certiorari petition in *first Pennington* was "May a labor union be held a conspirator under the Sherman Antitrust Act where it has achieved an industry-wide, multi-employer collective bargaining agreement, negotiated in accordance with procedures established by law, which results in stabilizing wage rates and working conditions at levels above the ability of some employers to pay?" *First Pennington* was responsive thereto.

B. Congress Has Repudiated Petitioners' Contentions Concerning Industry-wide Bargaining.

Review of the certiorari petition demonstrates Petitioners' assignments of reasons for granting the writ (Pet. 20), in the main, pertain to a criticism of industry-wide bargaining. However, Congress itself has rejected the thesis now pressed by Petitioners. Legislative debates in connection with Congress' enactment of the Labor Management Relations Act, 1947, demonstrate Congress' refusal to interfere with industry-wide and multi-employer bargaining.[10] Indeed, *NLRB* v. *Truck Drivers Union*, 353

[10] Legislative History of the Labor Management Relations Act, 1947 (U. S. Government Printing Office, 1948), Vol. I, pp. 326, 457, 584, 636, 643, 673, 715, 758, 760, 764-65; Vol. II, pp. 970, 1037, 1038, 1059, 1271-73, 1299, 1301-02.

Parks v. *IBEW*, 4 Cir., 314 F.2d 886, states (p. 906-07), "A strong provision prohibiting industry-wide bargaining was passed in the House" but eliminated from the Senate Bill; and attempts to reinstate the House provisions were defeated.

U.S. 87, 95, judicially records such refusal, noting that "Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations." Congressional debates are clear its refusal related to industry-wide bargaining.

Again, in 1959, legislative debates in connection with the Labor-Management Reporting and Disclosure Act of 1959 reflect Congressional determination not to interfere with industry-wide collective bargaining, by refusing to adopt proposals that the immunity accorded labor unions be excised from antitrust laws. Precisely the same arguments now directed by Petitioners are found in the legislative debates. However, there was opposition to such legislation, and Congress rejected the anti-labor proposals.[11] Thus, Petitioners' request that this Court condemn industry-wide agreements is to ask this Court to approve by judicial fiat what Congress refused to enact into legislation. Judicial acquiescence in such request is interdicted by *Colgate-Palmolive-Peet Co.* v. *NLRB*, 338 U.S. 355, 363-64, where it is said that, "The emasculation of the contract pressed for by the Board in order to achieve that which Congress refused to enact into law cannot be sustained."

First Pennington acknowledged the current efficacy of labor's exemption from the antitrust laws. Petitioners' proposal (Pet. 20) that this Court reach a result in light of reports before Congress, invites the admonition in *United Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U.S. 145, 153, that these "are decisions which we believe suited to the legislative and not the judicial branch."

[11] Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Government Printing Office, 1959), Vol. II, pp. 1941-42, 1690, 1508, 1717, 1747, 1748, 1837, 1189-90, 1320, 1809. See Appendix B for excerpts from the legislative debates.

Previous refusals on Congress' part to affect the current immunity of labor unions from the antitrust laws renders the *Bouligny* language particularly apt.

C. Both the Sixth Circuit and the District Court Properly Applied This Court's Guidelines Enunciated in *First Pennington*.

Contrary to Petitioners' assertions (Pet. 12, 20), the Sixth Circuit sanctioning the district court's holdings, correctly appraised *first Pennington* teachings to be (1) that a conspiracy between employers and labor formed with the intention of driving competitors out of business is a *Sherman* violation; (2) that "predatory intent" as used in *first Pennington* and by the district court "is merely shorthand, employed to describe this anti-competitive conspiracy" and (3) that such an anti-competitive conspiracy must be established by "clear proof," directing attention to *Gibbs*, 383 U.S. 715 (Pet. App. A 16). The Sixth Circuit and the district court clearly followed this Court's mandate in *first Pennington* as the following discussion shows:

1. The Lower Courts Correctly Determined That an Anticompetitive Conspiracy is Essential to a Sherman Violation.

In the Sixth Circuit, Petitioners contended the district court erred in concluding that *first Pennington* made it essential "to find predatory intent to drive small coal operators out of business in order to hold the employer and Union for a" *Sherman* violation.

First Pennington, 381 U.S. 664, continued to recognize, as *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, enunciated, that restraints on sale of employees' services are not commercial restraints outlawed by *Sherman* (pp. 502-03), a result stemming from Congressional immun-

ity accorded labor unions under the Clayton Act's Section 6 (15 USCA 17) which avows that "The labor of a human being is not a commodity or article of commerce", that antitrust laws do not "forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof" and that labor unions are not to be "construed to be illegal combinations or conspiracies in restraint of trade" and, as *first Pennington* states (p. 661), from *Clayton's* Section 20 and *Norris-LaGuardia's* Section 4.[12]

First Pennington, 381 U.S. 661, like *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, reiterated the pronouncement in *U. S.* v. *Hutcheson*, 312 U.S. 219, that the Sherman, Clayton and Norris-LaGuardia Acts must be jointly considered as "interlacing" statutes in determining whether labor union activities run counter to antitrust legislation and that "Conduct which they permit is not to be declared a violation of Federal law" (p. 806).

Allen Bradley made clear a collective bargaining agreement "standing alone" would not violate *Sherman*, and *first Pennington* adhered thereto. Under *first Pennington*, "a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers" and "No case under the antitrust laws could be made out on evidence limited to such union behavior" (381 U.S. 665). Similarly, footnote 2 recites that:

> "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform

[12]See Appendix A hereto for the full text of *Clayton's* Section 6 and other relevant statutes. Other statutes involved are printed in the certiorari petition, Appendix B, at pages 35-40.

> wage policy; and seek vigorously to implement it . . . The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay" (381 U.S. 665, fn. 2)

and that

> "Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy . . ."

The condemned element, which Justice White states must be *clearly shown* to effectuate the forfeiture, is expressed in the two sentences following the forfeiture statement and constitute the yardstick for the forfeiture: "One group of employers may not *conspire to eliminate competitors from the industry and the union is liable if it becomes a party to the conspiracy*" even "though the union's part in the scheme is an undertaking to secure the same" labor standards from the remaining employers in the industry (381 U.S. 665-66).

Pointing to the quoted language, the Sixth Circuit declared (Pet. App. A 15), "Justice White thus says in effect that if a union and some employers *conspire to eliminate some or all of the employers' competition,* this is a violation of the Sherman Act even if the mechanism is the imposition of a wage scale which the union is free unilaterally to impose." The Sixth Circuit then observed that it was on this premise—*i.e. that the bargaining agreement's purpose* "was to drive some employers out of business"—that Justice Douglas, joined by Justices Black and Clark, concurred, saying (381 U.S. 672-73):

> "On the new trial the jury should be instructed that *if there was an industry-wide collective bargain-*

> *ing agreement whereby employers and the union agreed on a wage scale* that exceeded the financial ability of some operators to pay *and that if it was made for the purpose of forcing some employers out of business,* the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws."[13]

This coincided with the district court's interpretation of Justice Douglas' concurring opinion where the trial court stated, "in order for an employer and a union to be guilty of violating the antitrust laws, the industry-wide agreement must exceed the financial ability of some operators to pay and *it must be made for the purpose of putting some employers out of business*" (166-67a).

Other recitals in Justice White's majority opinion support both the Sixth Circuit and the district court in their avowals of the necessity of proof of predatory intent or anticompetitive agreement. In denouncing employer-union conduct designed to eliminate a favored employer's competitive interest, as distinguished from an interest in regulating labor relations, Justice White noted, "The *anticompetitive potential* of such a combination is obvious, but is little more severe than what is *alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry*" (381 U.S. 668). Further, while Justice White made clear his opinion did not relate to the evidence's sufficiency (381 U.S. 665, fn. 2), but dealt only with the complaint's allegations, in sanctioning the denial of UMW's dismissal

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[13]Notably, Justice Douglas read the crux of *Pennington* to be "If the allegations in this case are to be believed, organized labor joined hands with organized business *to drive marginal operators out of existence*" (381 U.S. 674). Petitioners *assiduously avoid* including this factor in their certiorari petition (p. 2).

motion, Justice White noted the *allegation* was the union became a party to *a collusive bidding arrangement designed to drive operators from TVA's spot market* (381 U.S. 663). It is to this collusive, anticompetitive type of agreement that Justice White alludes in his statement that "*all such agreements* between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case" (381 U.S. 668). It is thus evident that Justice White's reference to "*such agreements*" embodies the concept of a collusive, anticompetitive agreement involvement which, if clearly proved—and only in such an event—would effect a forfeiture of a union's exemption from the antitrust laws, as *first Pennington* recited (381 U.S. 665).

2. The Sixth Circuit Properly Approved the District Court's Standard of Proof Required in Antitrust Cases.

In *first Pennington,* Justice White's opinion required *clear proof* to effectuate a forfeiture of the exemption Congress gave to labor unions from the antitrust laws (381 U. S. 665).

The district court concluded (167a), "The standard of proof necessary to show predatory intent is governed by *Gibbs* (383 U.S. 715, 736) wherein this Court mandated the implementation of *Norris-LaGuardia's* Section 6 to union conduct and recognized it is applicable in antitrust cases.

The Sixth Circuit found the district court "properly concluded that a degree of proof less than the 'beyond a reasonable doubt' requirement in criminal cases but greater than the 'preponderance of the evidence' standard of civil actions is necessary" to prove the anticompeti-

tive conspiracy (Pet. App. A 16). The Sixth Circuit's imprimatur of the district court's standard of evidence is consonant not only with *first Pennington's* clear proof requirement, but also with *Hutcheson's* command that *Sherman, Clayton* and *Norris-LaGuardia* be interpreted as "interlacing statutes" (312 U.S. 219). It blends with *first Pennington's* avowal concerning "harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation' " (381 U.S. 665).

3. Effects and Consequences May Not Be Substituted For A Conspiracy Under The Sherman Act.

Contrary to Petitioners' statement (Pet. 8) that the district court did not consider "the drastic effects throughout the whole industry", the district court held, "Justice White's Footnote No. 2 indicates that the anti-trust law is not designed to protect marginal operators; that *ill effects alone* on the marginal operators is not enough to show intent" (167a).

Petitioners' real complaint is that UMW should have abandoned its historical policy of uniformity, resorted to regional bargaining and acceded to Petitioners' demand that they be subsidized at the expense of coal miner members of UMW and thus afford coal producers in Tennessee a competitive advantage over their competitors—a complaint which *first Pennington* rejects.

It is evident that the crux of Petitioners' complaint is the refusal of both the district court and the Sixth Circuit to accept Petitioners' position that *effects and consequences* of the National Agreement to which multiple employers became signatory may be *substituted* for

conspiracy as the essential ingredient of a *Sherman* violation (Pet. 4, 8, 9, 20, 21), a view UMW asserts is contrary to *first Pennington.* Such substitution would completely strip of meaning Justice White's avowals that unilaterally a union may adopt a uniform wage policy and seek vigorously to implement it and the union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Petitioners' premise would render meaningless Justice White's further unequivocal statement that "Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act" and "There must be additional direct or indirect evidence of the *conspiracy*" (381 U.S. 665).

Since UMW can implement its wage policy only by collective bargaining and ultimately by agreement with multiple signatory operators, all permissive under national labor policy as willed by Congress and judicially sanctioned in *first Pennington,* to adjudge its conduct in light of effect and consequences is to render a union's immunity from *Sherman* as wholly illusory. Clearly, no inference of conspiratorial conduct may be derived from activities permitted by national labor policy. *Hutcheson's* command that a *Sherman* violation be determined only by reading *Sherman, Clayton* and *Norris-LaGuardia* as "interlacing statutes" (312 U.S. 219, 232) forbids a finding of conspiracy from permissible conduct. Indeed, *Allen Bradley* (325 U.S. 806) proclaims that conduct permitted by federal statutes "is not to be declared a violation of Federal law". Accord: *The Order of Rr. Telegraphers* v. *Chicago, etc. R. Co.,* 362 U.S. 330, 339-40. Otherwise, lawful exercise of collective employee rights would be converted into a conspiracy to restrain trade by imputing a purpose to obtain those effects on inefficient

employers which are but the by-product of UMW's pursuit of a uniform wage policy in the interest of its members.

In claiming the lower courts failed to implement *first Pennington,* it is obvious *Petitioners refuse to recognize the immunity Congress accorded labor unions* under antitrust laws. Results reached in cases decided since *first Pennington* which involved such exemption abundantly pinpoint the fallacy in Petitioners' contentions and demonstrate affirmatively the Sixth Circuit and the district court alike properly implemented *first Pennington's* guidelines. See *Cedar Crest Hats, Inc.* v. *United Hatters, Etc. Union,* 5 Cir, 362 F.2d 322; *Carroll* v. *American Federation of Musicians, etc.,* DC, S.D. N.Y., 1965, 241 F. Supp. 865, aff'd 391 U.S. 99 (1968); *Republic Productions, Inc.* v. *American Federation of Musicians,* etc., DC, S.D. N.Y., 1965, 245 F. Supp. 475.

D. The Sixth Circuit and the District Court Properly Rejected Petitioners' Contentions That PWC Violated *Sherman*.

In the Sixth Circuit, as in the district court, Petitioners theorized that by PWC's Paragraph A. UMW "expressly put upon itself a strait jacket which required it to impose upon all bargaining units in which it represented employees, the same terms which it negotiated with" BCOA (105a).

The district court's disagreement with Petitioners' contentions as to both Paragraphs A. and B. have been noted (*ante,* pp. 8-9). The Sixth Circuit agreed (Pet. App. A 17) with the district court that the disputed PWC, properly construed, did not require UMW to impose the wages therein contained on nonsignatory employers. It approved the legal principle that "where

two reasonable constructions of a written contract can be made, preference is given to that construction . . . that does not result in a violation of law," citing *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U.S. 686, 691 and *Perry Coal Co.* v. *NLRB*, 7 Cir., 284 F.2d 910, 914. *Significantly, Petitioners did not in the Sixth Circuit, and do not in this Court, contend that application of the legal principle employed is erroneous.*

Further, the Sixth Circuit added the observation, "even without the operation of this principle of law we would incline to the conclusion that the agreement did not constitute a violation of the Sherman Act, the record containing insufficient evidence from which a conspiracy or other violation could be found to have been clearly shown" (Pet. App. A 17).

These disagreements with Petitioners' assertions likewise challenge their statement, "it is undisputed that there was the intent to impose terms set by the conspirators on competitors" (Pet. 3, Question 3).

In light of the undisputed evidence herein discussed (*ante*, pp. 14-16) and the total absence of any contradictory evidence in the certiorari petition, it is settled law, *applicable in antitrust cases*, that insofar as a conclusion is based on inferences drawn from documents or undisputed facts, Rule 52(a), Federal Rules of Civil Procedure, is applicable and such findings of fact are not to be set aside unless clearly erroneous. *U. S.* v. *U. S. Gypsum Co.*, 333 U.S. 364, 394.

When it is recalled that the Sixth Circuit concurred with the district court's findings and conclusions regarding PWC's validity, as stated in *U. S.* v. *Johnson*, 319 U.S. 503, 518, it should "take something more than in-

genious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents".

E. Petitioners Seek This Court's Review of Evidence Which Both the District Court and the Sixth Circuit Have Held Did Not Support Their Charge That UMW Conspired in Violation of the Sherman Act.

District court findings with which the Sixth Circuit concurred appear herein (*ante*, pp. 6-9). As already noted (*ante*, p. 27), this Court recognizes that a conclusion based on inferences drawn from documents or undisputed facts in antitrust cases must be affirmed unless clearly erroneous. Since each of the findings had the concurrence of both lower courts, this Court should reject the invitation to review the instant case, implementing its rule that "We do not grant a certiorari to review evidence and discuss specific facts". *U. S.* v. *Johnston*, 268 U.S. 200, 227.

CONCLUSION

Petitioners' "claimed existence" of the conspiracy is to be "found in constant assertion" by them and their counsel *"rather than in the proof." G & P Amusement Co.* v. *Regent Theater Co.*, DC, N.D. Ohio, 1952, 107 F.-Supp. 453, 461. Petitioners' total want of evidence invites a repetition of Judge Medina's admonition in *U. S.* v. *Morgan*, DC, S.D. N.Y., 1953, 118 F.Supp. 621, 634, that *"Either there is some agreement, combination or conspiracy or there is not" and the answer must be found in evidence adduced and not "in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there."*

For the reasons herein discussed, UMW submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October, 1968

APPENDIX A

15 USCA›

§1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on con-

viction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, July 7, 1955, c. 281, 69 Stat. 282.

§2. MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, §2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§15. SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731.

§17. ANTITRUST LAWS NOT APPLICABLE TO LABOR ORGANIZATIONS

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and opera-

tion of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, §6, 38 Stat. 731.

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29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§52: STATUTORY RESTRICTION OF INJUNCTIVE RELIEF

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating infor-

mation, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

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29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§102: PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing,

to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, §2, 47 Stat. 70.

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29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§104: ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, §4, 47 Stat. 70.

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29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization

of, such acts or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90 §6, 47 Stat. 71.

. . .

Rule 52(a), Federal Rules of Civil Procedure:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

APPENDIX B

Excerpts from

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959

(Government Printing Office, 1959), Volume II.

Representative Rhodes of Pennsylvania:

pp. 1641-42:

. . . .

"No longer was there regard for the economic problems of individual business firms or the impact of demands upon any local industry or area affected."

. . .

"No longer was wage bargaining a matter for elected local union leadership. Now, professional labor leaders at the national or international level did the dickering, setting wage patterns for whole industries . . ."

. . .

"Chief victims of labor monopoly power remain the consumer and the small businessman."

. . .

Representative Alger of Texas:

p. 1508:

. . . .

"The consequent denial to unions of the right to fix prices . . . would not in any way interfere . . . with their proper collective bargaining powers. They would merely be placed on an equal footing with all other groups in society as was the case during the fifty years prior to the Hutcheson decision."

. . .

p. 1690:

"The unions should be put under the antitrust laws so that business and labor will both operate under the same ground rules."

. . .

"Monopolistic practice of industrywide and pattern bargaining by professional labor bosses at the national or international level would be ended."

. . .

Representative Hoffman of Michigan:

p. 1717:

. . .

"When we were writing the Taft-Hartley law, . . . we had in it a provision designed to prevent nationwide, industry-wide bargaining."

. . .

"There would appear to be no sound reason why those provisions making anti-monopoly laws applicable legislation to unions should not now be in this bill."

. . .

Representative Heistand of California:

p. 1748:

. . .

"Prevent centralized control of collective bargaining policies by national or international unions, and return these functions to the local union level."

. . .

". . . big power combinations of unions would be broken up, just as the big corporation trusts of the 1890's were broken up by the Sherman Act."

. . .

Representative Flynn of Wisconsin:

p. 1837:

. . .

". . . As we get big unionism to match big business, we will indeed have a new type of economy . . . is this for the best interests of America and the people of America?"

. . .

Senator Morse of Oregon:

p. 1190:

. . .

"Labor law in America reflects increasing awareness that no sound economic theory permits free market thinking to be applied to wages and working conditions, as it is to prices. In the absence of collective bargaining the wage market is a fiction for wages and working conditions are established unilaterally by the employer. Competition among workers against each other for jobs produces not fair wages, but sweatshops; not increased productivity, but depressions. Society should not, under the guise of preserving freedom to compete, force them to bear the competitive burden which an entrepreneur in hope of profit, voluntarily assumes. In modern industrial society, meaningful economic freedom for the vast majority of employees can be attained not through individual, but from collective action.

"This was the reasoning behind Congress' declaration in 1914 in the Clayton Act that 'the labor of a human being is not a commodity or article of commerce' and that labor unions shall not 'be held or construed to be illegal combinations in restraint of trade under the antitrust laws.' That declaration reflected recognition that 'to render a labor combination effective it must eliminate the competition from nonunion made goods,' and that

elimination of price competition based on differences in labor standards is the objective of any national labor organization. Once the purpose of employee combination was thus recognized, sanction of the conventional tactics of organized labor in its effort to improve its material conditions followed inevitably. These tactics, peaceful primary picketing are the only civilized means through which organized workers can safeguard their own wages and working conditions against the competition of unorganized workers; the only way—short of governmental wage fixing—through which price competition based on differences in labor costs can be eliminated. To deprive organized workers of these means of competing with unorganized workers dooms their objective to defeat.

"Once we recognize that establishment of uniform wages and hours through collective bargaining as desirable, common sense should accept peaceful tactics by which unions traditionally seek in their own self-interest, to enlist nonmembers. Those who choose to work as nonunionists, by that very choice, tend to defeat and undermine the economic interests of union members in maintaining good wages and working conditions for themselves. In defense of their own economic position and in the fact of varying shades of employer hostility, union members should accordingly be free to utilize such economic power as they possess to persuade employees of the value of their cause."

. . .

Representative Oliver of Maine:

p. 1809:

. . .

"As I see the picture, Mr. Speaker, the adoption of this Landrum-Griffin conference report leads in only one

direction. It is just one more step toward more restrictive labor legislation. The U. S. Chamber of Commerce, the National Manufacturers Association, speaking and acting for big business with their appetites for further labor control whetted by this victory, will press for the ultimate victory; namely, a national so-called right-to-work law and then, the antitrust stranglehold for which they are really aiming. Many of them have already so stated. The program of big business in America is not only to control financially and economically, but also politically . . ."

• • •

"The Landrum-Griffin conference report will not only slow down further the growth and strength of the trade-union movement, but it will eventually lead to the more repressive developments to which I have referred; namely, the so-called right-to-work laws on a national scale and then, the crowning blow, the antitrust knock-out punch. This will mean the breakdown of American democracy.

"As long as I am a Member of this House, Mr. Speaker, my vote will never be recorded for legislation which makes illegal the economic weapons which the working men and women need, to fight for and get their fair share of the production of this great productive plant which is known as industrial America.

"Mr. Speaker, I am opposed to and shall vote against this Landrum-Griffith conference report."

• • •

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 558

JAMES M. PENNINGTON, ET AL,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

PETITION FOR A REHEARING ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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12-16-68-60

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CERTIFICATE 8

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 58 of the Court, Petitioners James M. Pennington, et al., respectfully pray that the Court rehear and grant their petition for a writ of certiorari, which writ was denied by the Court by order of December 9, 1968. Mr. Justice Black favored granting the writ. Mr. Justice Fortas did not participate. Petitioners respectfully assign the following new or intervening substantial matters:

1. IN THESE CIRCUMSTANCES DENIAL OF THE WRIT IS A DENIAL OF DUE PROCESS: WHEN THIS COURT HAS ASSUMED JURISDICTION TO LAY DOWN

RULES TO GOVERN A SECOND TRIAL OF A CASE, AND IN RELIANCE THEREON UNDISPUTABLE EVIDENCE CONSISTENT WITH THOSE RULES HAS BEEN INTRODUCED, IT IS A DENIAL OF FUNDAMENTAL FAIRNESS FOR THE COURT TO REFUSE TO REVIEW THE SUBSTITUTION OF AN INCONSISTENT AND DIFFERENT RULE BY THE TRIAL COURT. IF THIS COURT WAS WRONG IN THE RULE IT LAID DOWN FOR THE SECOND TRIAL, PETITIONERS SHOULD BE GIVEN ANOTHER TRIAL UNDER THE RIGHT RULE.

The combined opinions of Mr. Justice White and Mr. Justice Douglas, carrying the votes of six members of this Court, plainly established that the heart of successful proof, in this case, proof that must necessarily be sufficient without regard to predatory intent, would be a combination of these elements—(1) a union-business agreement that strait-jacketed the union in its bargaining policy, and (2) proof of anti-competitive effects of the national contracts. We submit that these elements (at least when combined) establish a correct reconciliation of anti-trust and labor laws and when they appear should govern such cases as this.

In reliance upon the ruling of this Court, petitioners submitted proof at the second trial that indisputably satisfied both these elements. The strait-jacket agreement, the Protective Wage Clause, is quoted in the schedule at the end of our petition for certiorari. This was the result of a "quid pro quo" between the union and the dominant coal association, BCOA (2143a, 2185a-6a). Also there was statistical proof that the whole combined industry throughout the country was operating at losses under the national contracts if the two dominant companies were removed from the statistics (to say nothing of the effects in Tennessee). These facts are indisputable.

The prior opinion of Mr. Justice White (joined by the Chief Justice and Justice Brennan) ruled that a strait-jacket agreement restricting the union's bargaining policy violated antitrust policy "without regard to predatory intention or effect" (381 U.S. 688). The prior opinion of Mr. Justice Douglas (joined by Justices Black and Clark) ruled that proof of an industry-wide collective bargaining agreement that forced some employers out of business "is prima facie evidence of a violation . . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act" (381 U.S. 672-3).

Thus this Court plainly told petitioners that predatory intent to drive small coal operators out of business was not a specific element that had to be proved and it is even more clear that it did not have to be proved by Norris-LaGuardia's "clear proof" since this case could only deal with "authorized" national contracts.

But after the proof was concluded and submitted to the Trial Judge, he filed a memorandum holding that the opinions of this Court (which were to control the second trial under the order of this Court) were mutually inconsistent, and he established the rule that petitioners must necessarily prove "predatory intent to drive small coal operators out of business" with proof (apparently direct evidence) so strong as to satisfy the "clear proof" rule of Norris-LaGuardia (257 F. Supp. 829). It made no difference to the Trial Court that the national contracts over the period of a decade were clearly authorized by the union. He further ruled that the meaning of this Court's opinions was that the Sherman Act was "not de-

signed to protect marginal operators" (257 F. Supp. 829). These views were wrong and fly in the face of all established concepts of the Sherman Act and of the Constitution itself. But most importantly, for the purposes of this petition, we say that this was a switching of the rules after our proof was submitted under a different set of rules established by this Court.

It is submitted that a continuance of this Court's denial of the writ of certiorari will work fundamental unfairness upon these petitioners such as to deprive them of any fair chance in a second trial and therefore constitutes a deprivement of due process. If this Court was wrong in its prior decision, petitioners should have the right to go to trial and submit proof under the right rule. The fact that there is proof upon which they could win is shown by the fact that they won a jury verdict on the first trial.

We respectfully ask the Court to consider that these petitioners (though they be "marginal" and apparently so insignificant in the industry as to have no rights under the Sherman Act according to the Trial Court) have fought this case for eleven years. They have had judgments of over a half million dollars entered against them by reason of contracts forced upon them. The costs adjudged against them after the first trial and appeals were in excess of $8,000 to say nothing of their own costs, and if the Court continues to deny the writ, these costs will now be repeated again. Manifestly, justice received on the second trial and appeal has not been worth the price, and this record constitutes a sad footnote in the annals of the so-called "favored" private Sherman Act case.

2. THE NATIONAL CONTRACTING POLICIES CONTINUE: THE STRAIT-JACKET THAT EMBRACES THE UNION WHICH DOMINATES THE APPALACHIAN REGION

CONTINUES TO DEPRIVE THAT REGION OF PEACE AND ANY FAIR CHANCE TO RESTORE VITALITY IN ITS ECONOMY. THE DEAD HAND OF THIS KIND OF COMBINATION WILL INEVITABLY SPREAD TO OTHER INDUSTRIES AND OTHER REGIONS.

Since the period involved in this case, the UMW and BCOA have negotiated national contract amendments in 1964, 1966 and 1968, each time making substantial, flat, blanket increases across the board, the 1968 increase being several times the size of any previous increase.

In the meantime the UMW and BCOA, side by side, are continuing their apparently successful campaign to beat off efforts at challenge of the Protective Wage Clause and later "Eighty Cent" Welfare Clause under the Labor Law. We are advised (but cannot state as a fact) the Labor Board has withheld final action pending this Court's decision in this case. See *Lewis v. NLRB*, 350 F. 2d 801.

The ruling that the Protective Wage Clause will be allowed to dominate the coal industry in perpetuity will have serious implications throughout the industry, particularly in the Appalachians. Such a rule by oligopoly over an industry with such diversity of size, resources and varying methods of production and geological circumstances, has had serious and broad effects already, and such effects will multiply if the resistance to such rule in the Labor Board case, and more importantly in this case, is defeated. It is only in this antitrust case that the issues involved can be met in full perspective.

In the meantime the pattern of violence that is reflected in the District Court's opinion in this case, and in numerous other records, goes on. Since the filing of the petition for certiorari there have occurred in October and

December two instances of dynamitings of mining equipment in the vicinity of the operations of the two petitioners who remain in business, each with consequent losses in excess of $500,000. We do not say that UMW authorized such instances, but we do say that there is inevitable conflict, turmoil and unrest if employers and employees or their representatives in their own units and circumstances cannot sit down and engage in bona fide bargaining as contemplated in the Labor Law. That is the express reason for the Labor Law. Such instances of destruction almost always happen to companies who have failed or refused to sign the impossible but one and only union contract whose terms cannot be changed. There is small wonder that the area, with such a long history of turmoil, is shunned by new industry and that coal remains the only hope of survival. But what kind of hope is that for the Appalachian region under an oligopoly like this?

It is a soulless, faceless rule that has long demonstrated no feeling for the interests of union members in the forced elimination of three-fourths of them from jobs. Protests against the contract of the men at their conventions is part of the record now before the Court (PP 829a-836a) including this complaint (P 833a):

> "According to Mr. Kennedy when he was commenting on the contract, he stated he thought the increases in wages were the best for the economic condition. I wonder whether that is so; whether a shorter week would be better. We work in the mines in my district, jump on a belt line and ride maybe a thousand or two thousand feet, put a respirator on and go up to the face and work. When we grab a drink of water or a bite to eat, there is a man standing behind us with a stop watch. We work a machine and try to keep up with that machine. I wonder which wears out first, the man or machine."

This statement was made in 1956, but identical language is expressed in several reported interviews made since public attention has recently been sharply called to the question of mine safety. It is unreasonable to expect real human concern from an oligopoly devoted to selfish interests.

Clearly from labor articles, men in positions of leadership in labor and management in other industries are interested in the fate of coal's Protective Wage Clause. It is a device where big business and big labor can work with profit in ease and happy harmony, to the discomfort of everyone else in the industry and ultimately of the public.

Reflection will convince that these expressions are not overstatements of the consequences of this Court's order denying the writ. The fat will really be in the fire in our economic order if this type of oligopoly is turned loose. Realizing that the Court is simply too busy to consider all truly serious matters brought before it, still we respectfully suggest that the Joint Economic Committee of Congress has not been wrong all these years in its annual complaint that the main trouble in the economic system is the failure of the executive and judicial branches to apply and enforce the antitrust law and preserve *real* competition, saying that the stage has long since been reached when all government policies must not frustrate, but must be made to conform to this purpose if our free enterprise system is to survive. The denial of the writ is a mighty blow in the directly opposite direction.

Respectfully submitted,

JOHN A. ROWNTREE,
1412 Hamilton Bank Building,
Knoxville, Tennessee 37902,

Attorney for Petitioners.

CERTIFICATE

This is to certify that the undersigned, John A. Rowntree, a member of the bar of this Honorable Court, is attorney for petitioners in the foregoing petition and that the same is presented in good faith and not for delay, and that the petition is restricted to intervening circumstances of substantial and controlling effect or to other substantial grounds not previously presented.

John A. Rowntree

JOHN A. ROWNTREE, Attorney